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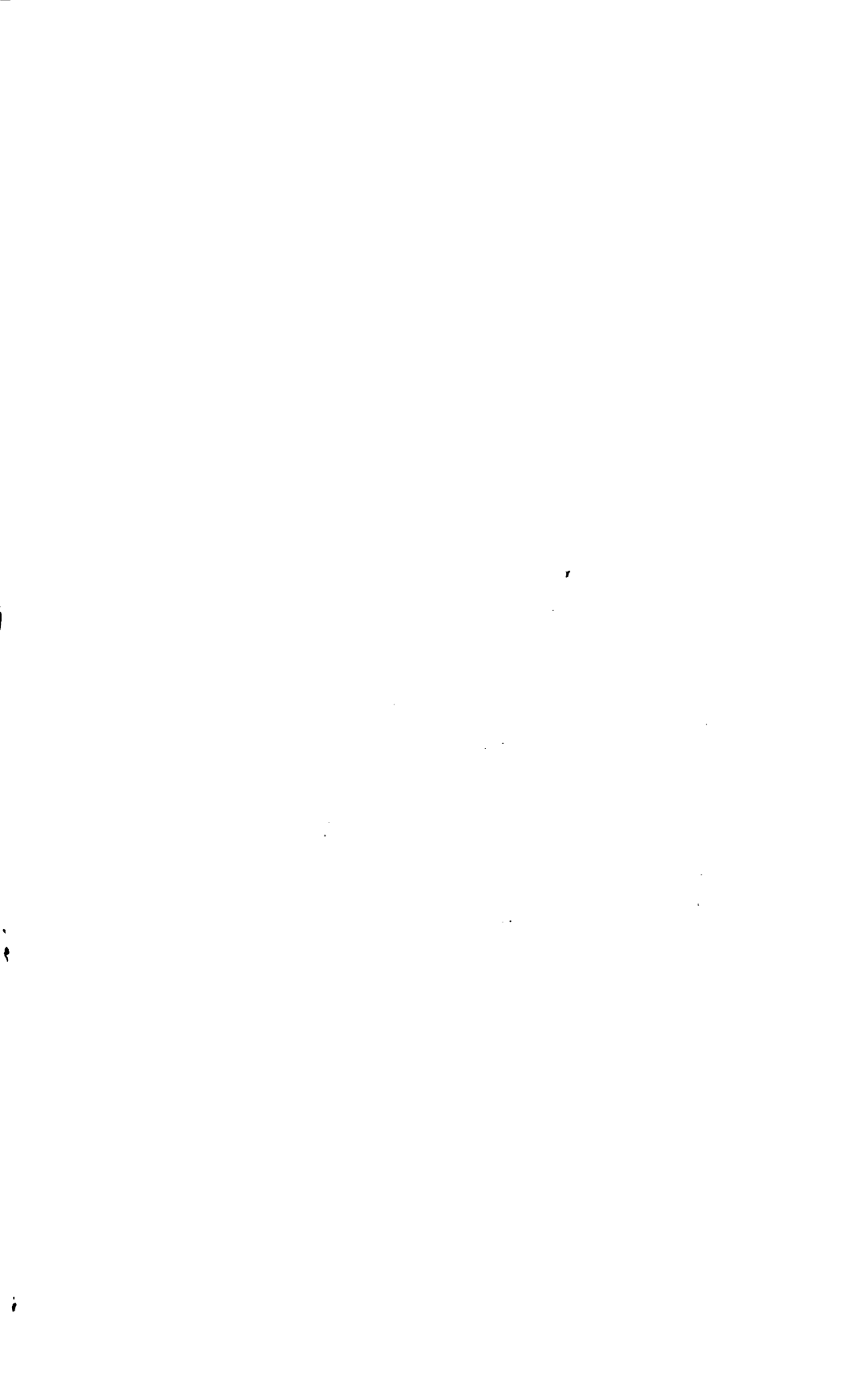
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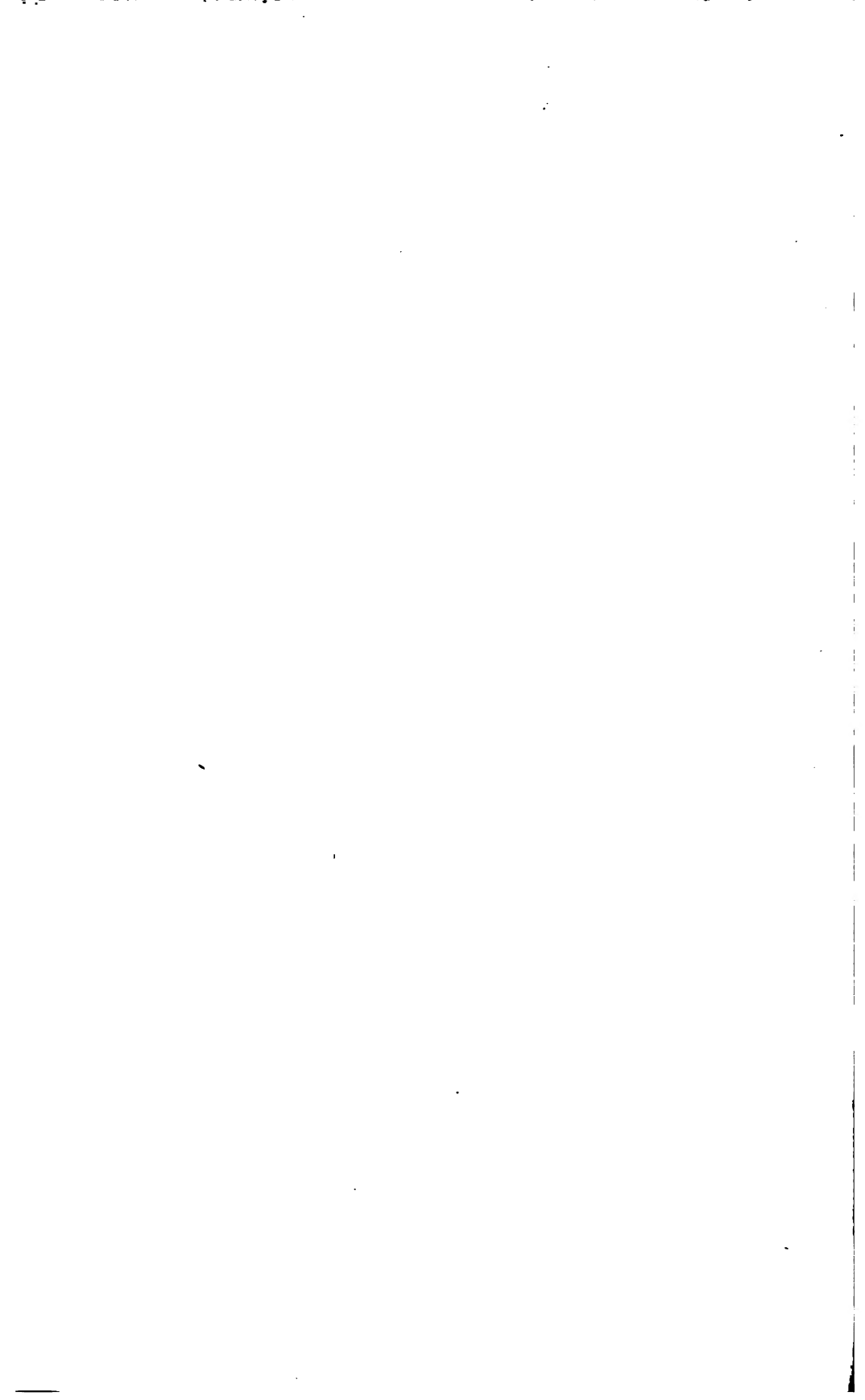
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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

FROM AND INCLUDING DECISIONS OF JANUARY 18, 1887, TO AND
INCLUDING A PORTION OF THE DECISIONS OF
MARCH 8, 1887.

WITH

NOTES, REFERENCES AND INDEX.

BY H. E. SICKELS,
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VOLUME CIV.

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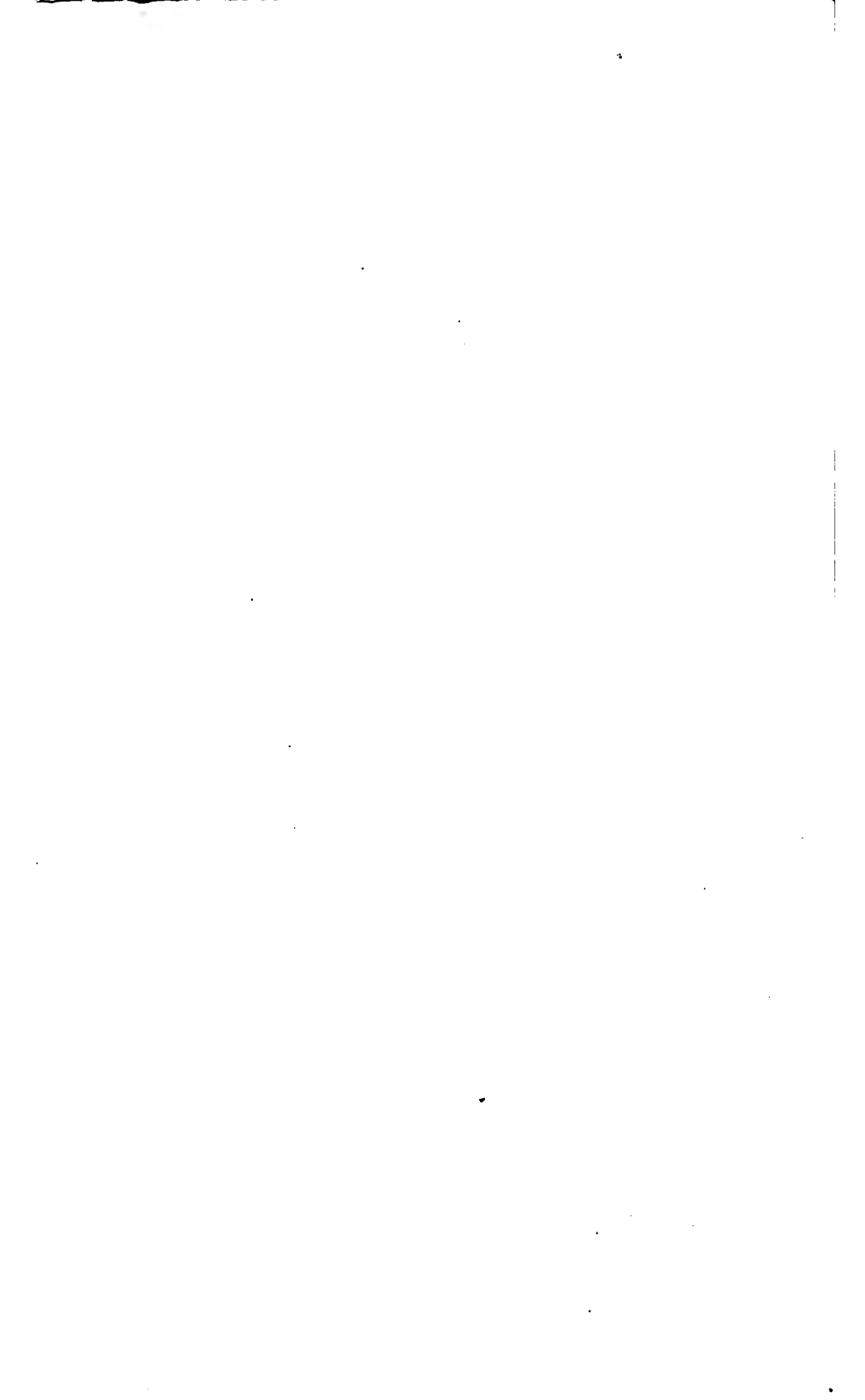


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In the Matter of the Petition of the NEW YORK CABLE COMPANY, Appellant, v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, et al., Respondents.

The act of 1875, known as the "Rapid Transit Act" (Chap. 606, Laws of 1875), prior to the passage of the "General Surface Act" (Chap. 252, Laws of 1884), authorized the formation of companies to construct street railways on the surface, to be operated by any power other than animal. (EARL, J., dissenting.)

The "General Surface Act" was not intended to, and does not interfere with the rights of any street surface railroad company organized before its passage under the "Rapid Transit Act;" it only prohibits the construction of surface roads by corporations thereafter organized. The saving clause in the "General Surface Act" protects, not only consummated and perfected rights of a company theretofore organized, but such rights as the company had, although inchoate and subject to the performance of further conditions; and by the subsequent performance of the conditions those rights are perfected. (EARL, J., dissenting.)

As, however, the "Rapid Transit Act" prescribes the proceedings by which rights may be acquired, a substantial compliance with the material requirements of the act is a condition precedent, without performance of which a company never became legally incorporated or acquired any rights under the act.

The intent of the provision of the "Rapid Transit Act" (§ 6), requiring the commissioners appointed by the mayor of a city to fix and determine

* This volume also contains two cases, the first one, and *Wright v. Chapin*, post page 369, which were not reported when reached in their order, as motions were then pending for reargument.

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the time within which the proposed railway or railways, or portions thereof shall be constructed, is to limit the corporation in respect only to time during which it is possible for it to prosecute the work, excluding time when legal barriers exist to such prosecution.

Where, therefore, the commissioners appointed by the mayor of New York specified a time within which each of twenty-nine different routes located by them should be completed, but provided that the time should begin to run from the date of the obtaining the requisite consent of property owners and of the local authorities, or, in case of failure to procure such consent, from the date of the confirmation of the report of commissioners appointed by the court; and also provided that the time unavoidably consumed by the pendency of legal proceedings or the interference of public authorities, or the omission to open or grade shall not be deemed a part of the time limited. *Held*, that this was a substantial compliance with the act.

The articles of association, framed by the mayor's commissioners, instead of providing, as required by said act (§ 7), for the release and forfeiture to the supervisors of the county of all the rights and franchises acquired by the corporation, in case the proposed railways were not completed in time, provided, that in case the several portions of such railways were not completed each within the time limited, the rights and franchises "for and as to any portion of such railway or railways not so completed," shall be released and forfeited. *Held*, that this was a material departure from the requirements of the act; that the provision should have been for the release and forfeiture of all the rights and privileges; that the provision was an attempt to override the action of the Legislature in refusing to make the amendment to the "Rapid Transit Act" of 1882 (§ 2, Chap. 393, Laws of 1882), applicable to the city of New York, by incorporating the substance of the amendment in the articles of association.

Also, *held*, that as there was no general law, declaring a forfeiture or requiring a release to the supervisors, a compliance with the provision was necessary to carry out the legislative intent, and the failure to comply was a fatal defect in the articles.

Also, *held*, that while by the act of 1870 (Chap. 190, Laws of 1870) the board of supervisors of the county of New York, composed of supervisors, as before elected or appointed, was declared abolished, a new board of supervisors was created (Chap. 137, Laws of 1870) and is in existence to which the franchises of the company may be forfeited and released.

Under the provision of the Rapid Transit Act (§ 5), requiring the mayor's commissioners to fix the plan or plans for the construction of the railway or railways, it is, at least, essential that they shall determine whether the contemplated road shall be an underground, overground or surface road. and a failure on their part to determine this ques-

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tion is a failure to comply with one of the conditions precedent to the acquisition of corporate power.

By the resolutions of the commissioners, incorporated in the articles of association, as to several of the routes laid out, it was left to the subsequent election of the company whether they should be surface or elevated roads. As to other routes, where the articles provided for elevated roads, with a double track, authority was given to the company to add such other tracks as might, from time to time, be needed to accommodate increasing traffic and to make such additions to the structures as might be needed. It was, also, left to the company to determine as to the method of supporting the tracks, *i. e.*, whether they should be carried on longitudinal girders resting on the top of columns or by transverse girders supported by columns. The power to erect stations and platforms was not restricted or defined, but it was left to the company to decide where they were necessary, it was authorized to occupy so much of the sidewalks for stairways and approaches "as may be necessary," and also to construct "such supports, turn-outs * * * stations, buildings, platforms, stairways * * * and such other requisite appliances as shall be proper." *Held*, that the commissioners failed to substantially comply with the act, and that as such compliance was essential there was no valid organization of the petitioner.

A motion for reargument was made upon papers showing proceedings instituted to amend in the particulars in which the court had held the articles to be defective. *Held*, that, conceding such proceedings were effectual, they would not afford ground for a reargument, as the jurisdiction of this court is confined to a review of the determinations actually made by the Supreme Court, and must be had upon the same papers which were before the General Term.

It seems that the order of this court affirming the order of General Term, denying the application of the petitioner will be no obstacle to a rehearing by the General Term, or to a new application, based upon new facts. Where it is sought to take the property of an individual under powers granted by statute to a corporation, to be formed in a particular manner therein directed, the constitutional protection of the rights of private property requires that the powers granted be strictly pursued, and all the prescribed conditions performed.

It seems where the power is conferred upon a corporation duly formed, it will not be defeated simply because the corporation has done or omitted some act which may be a cause of forfeiture of its rights and franchises, as it rests with the State to determine whether such forfeiture will be enforced.

In re G. E. R. Co. (70 N. Y. 361); *In re N. Y. E. R. Co.* (70 id. 327); *In re B. W. & N. R. Co.* (72 id. 245) distinguished.

(Argued October 21, 1886; decided December 17, 1886.)

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APPEAL from order of the General Term of the Supreme Court in the first judicial department, made December 1, 1884, denying a motion on the part of the petitioner, the New York Cable Railway Company, to confirm the report of commissioners appointed by the Supreme Court to determine whether the railways described in the petition of said company ought to be constructed and operated.

The report of the commissioners was in favor of the petitioner. The refusal to confirm their report was upon the ground that the petitioner had no legal right to construct or operate a railway.

The facts, so far as material, are stated in the opinion.

Wm. M. Evarts, Robert Sewell, Everett P. Wheeler, Chas. P. Shaw for appellant. The decision in this case having been put solely on legal grounds is appealable to this court. (*Allen v. Myer*, 73 N. Y. 1; *Tolman v. S. B. & N. Y. R. R. Co.* 92 id. 356; *Russell v. Conn.* 20 id. 83.) The motion to confirm the report of the commissioners should be granted. (*Morris v. Talcott*, 96 N. Y. 100; *Marvin v. Marvin*, 78 id. 541; *Fredericks v. Taylor*, 52 id. 526; *Sturgis v. Spofford*, 58 id. 103; *Fulton Fire Ins. Co., v. Baldwin*, 37 id. 652.) Section 16 of the act of 1884 (Chap. 252) cannot be so construed as to take away vested rights, and would be void if it attempted to do so. (*Westervelt v. Gregg*, 12 N. Y. 209; *State Constitution*, art. 1, § 6; *Stuart v. Palmer*, 74 id. 183.) The Legislature cannot pass a law impairing the obligation of a contract. (*U. S. Con. art.* 1, § 10; *In re Bank of Buffalo*, 21 N. Y. 14, 15; *In re Reciprocity Bank*, 17 How. Pr., 327; *Farrington v. Sec. of Tennessee*, 95 U. S. 679; *Dodge v. Woolsey*, 16 How. [U. S.] 367; *State Bank of Ohio v. Knapp*, 18 id. 331.) A contract between the State and a citizen cannot be modified or changed by any act of the legislature. (*Donald v. State*, 89 N. Y. 36; *People v. Otis*, 90 id. 48.) Statutes are never to have a retrospective or retroactive operation unless it is so clearly expressed in the act, and

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not then if it would take away vested *rights* (as distinguished from remedies). (*Goillotel v. Mayor, etc.*, 87 N. Y. 441; *People v. Lord*, 12 Hun, 282; *Johnson v. Burrell*, 2 Hill, 238; *Butler v. Palmer*, 1 id. 325-334; *Dash v. Van Kleeck*, 7 John. 477; *McMannis v. Butler*, 49 Barb. 176; *Waddell v. Elmendorf*, 12 id. 585; *Burley v. Pampacher*, 5 Duer, 188; *Ganson v. City of Buffalo*, 1 Keyes, 460-461; *Potter's Dwarris on Statutes*, 162, n. 9; 1 *Kent's Com.*, 455; *Jarvis v. Jarvis*, 3 Edw. Ch. 462; *Van Rensselaer v. Livingston*, 12 Wend. 420-491.) The right of the company to complete its proceedings is a vested right. (*In re Thirty-fourth St. R. Co.*, 5 East. R. 697; *Westervelt v. Gregg*, 12 N. Y. 202; *Hurd v. Cass*, 9 Barb. 866; *Holmes v. Holmes*, 4 id. 295; *Snyder v. Snyder*, 3 id. 621; *Benson v. Mayor, etc.*, 10 id. 223-234; 2 *Kent's Com.*, 275.) When the right to alter, amend or withdraw franchises is provided for in the charter itself, it may be done, as that is a part of the contract, but not otherwise. (*McLaren v. Pennington*, 1 Paige, 102.) The act of 1875, under which the Cable Company is incorporated, contains no such provision. (*McLaren v. Pennington*, 1 Paige, 102; *Benson v. Mayor, etc.*, 10 Barb. 223; *Dartmouth College v. Woodward*, 4 Wheaton, 518; *State Bank of Ohio v. Koop*, 16 How. [U. S.] 369; *Dodge v. Woolsey*, 18 id. 331; *N. O. Gas Co. v. Louisiana Light Co.*, 115 U. S. 650.) If there be a *bona fide* endeavor to comply with the requirements of the general acts for the creation of corporations and a certificate be filed, which is in good faith an attempt to follow them, a corporation *de facto* is created, which has the right to sue and be sued, and whose existence cannot be challenged collaterally, but only in a proceeding by the attorney-general. (*Eaton v. Aspinwall*, 19 N. Y. 119, 121; *Buffalo & Alleghany R. R. Co. v. Cary*, 26 id. 75-77; *In re N. Y. El. R. R. Co.*, 70 id. 338; *Methodist Church v. Pickett*, 19 id. 482; *Bank of Toledo v. International Bank*, 29 id. 542; *Holmes v. Gilliland*, 41 Barb. 588; *Mechanic's Building Association v. Stevens*, 5 Duer. 676;

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In re Brooklyn, etc., R. R. Co., 75 N. Y. 335.) Even if the railroad crosses prohibited streets the part not prohibited is valid. (*Gilbert El. R. Co.*, 70 N. Y. 361, 373; Laws of 1881, chap. 485 § 2.) Even if there was a defect in the organization of the corporation, it could only be taken advantage of by the State, by a direct proceeding for that purpose by the attorney-general, which the State could waive, either expressly or by omitting to proceed, or by subsequent legislative recognition. (*In re N. Y. El. R. R. Co.*, 70 N. Y. 338; *White v. Ross*, 15 Abb. 66; *Black River & Utica R. R. Co. v. Barnard*, 31 Barb. 258.) A provision in a public statute like this, prescribing a time within which an act should be done, containing no negative words forbidding the doing of the act afterwards, is directory, and a literal compliance with its terms in regard to time is not essential to the validity of the act. (Sedgwick on Stat. and Const. Law. 370, 371, 376; *People v. Sup'rs. of Ulster*, 34 N. Y. 272; *Barnes v. Badger*, 41 Barb. 99.) When any act or thing is ordered to be done or agreed to be done, and no time is specified, it must be done in a *reasonable* time. (*Fickett v. Brice*, 23 How. 194; Story on Con. § 790; 2 Pars. on Con. 47, 173.) All the circumstances being known what is a reasonable time is a question of law. (Story on Con. § 790; 2 Pars. on Con. 173.) The order of the General Term is appealable under chapter 270 of the Laws of 1854. (*In re Brady*, 69 N. Y. 219; *Allen v. Myer*, 73 id. 1; *Tolman v. S. B. & N. Y. R. R. Co.*, 92 id. 356; *Russell v. Conn.* 20 id. 83; *In re Kings Co. El. R. Co.*, 82 id. 95; *N. Y. El. R. Co.*, 70 id. 327, 333; *Thirty-fourth St. R. Co.*, 5 East. R. 697.)

William C. Trull and Luke F. Cozans for the Chambers Elevated, etc., Railroad Company and others, respondents. Statutory provisions as to time are to be deemed directory unless of the essence of the thing to be done. (*Wood v. Chapin*, 3 Kern. 509; *In re Emp. Cty Bk.* 18 N. Y. 200; *People v. Cook*, 4 Seld. 69; *Bowers v. Badger*, 41 Barb. 98,

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99; *In re N. Y. El. R. R. Co.*, 7 Hun, 241.) The proviso of section 4 of the act of 1875, makes the consent of the property owners and local authorities, or the determination of the commissioners confirmed by the court in lieu of consent of the property owners, a condition precedent to the exercise of the power previously of locating routes. (*Voorhes Bk. of U. S.* 10 Pet. 449; *Weyman v. Southard*, 10 Wheat. 150; *In Re Second Avenue M. E. Church*, 66 N. Y. 395; *In re Webb*, 24 How. 247; *In re N. Y. El. R. R. Co.*, 70 N. Y. 359.) The mayor's commission had no power to locate a route upon the surface of the streets. (*In re N. Y. El. R. R. Co.*, 70 N. Y. 343; *In re Gil. El. R. R. Co.*, id. 361.) The action of the mayor's commission in resolving, as it did, that "on streets chiefly used for residences, or bordering on parks or public squares, or on a river front, stations may be placed over the sidewalks of the streets," was a clear neglect of duty and assumption of power. (*Matlage v. N. Y. E. & M. R. R. Co.*, 67 How. Pr. 232; *In re Boston, etc.*, 10 Abb. [N. C.] 104; *N. Y., etc., v. Godwin*, 12 Abb. [N. S.] 21; *N. Y., etc., v. New York*, 11 Abb. [N. C.] 383; *N. Y. C. v. Cottle*, 90 N. Y. 342, 347-349.) The provision of the sixth section of the act requiring the commissioners to "fix and determine a time" within which the road should be constructed and ready for operation, demand that a fixed, stated and definite time should be named. (*Donohue v. O'Connor*, 45 Sup. Ct. R. 299; *N. Y. Cable R. Co. v. Forty-second St. R. R. Co.* Ms. op.) The failure of the mayor's commission to comply with all the requirements of the statute in these particulars, renders the organization of the petitioner as a corporation defective and invalid. (1 Wood Rail. Law, 13, § 8; *In re N. W. & M. R. Co.*, 72 N. Y. 245; *Steam Transit Co. v. City of Brooklyn*, 78 id. 524.) The provision of the act of 1884, expressly prohibiting the construction by the petitioner of any railway upon the surface of the streets, applies to every street surface railroad not then constructed which claims the right to construct, under the authority of a commission appointed under the act of 1875. (*Falconer v. B. N.*

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J. R. R. Co., 69 N. Y. 491; *People v. Trustees of Ft. Edward*, 70 id. 28.) The legislature has power thus to prohibit the construction of the petitioner's road. (1 R. S. 800; Const., art. 8, § 1; Laws of 1875, chap. 606, § 34.) If the act of 1875 authorizes the construction of railways of the character of those claimed by the petitioner, it is unconstitutional, because of its failure to provide adequate compensation for the private property required to be taken in the construction and operation of the petitioner's railways. (70 N. Y. 327, 354, 360; *Wilson v. N. Y. C. R. R. Co.*, 47 N. Y. 161; *Arnold v. H. R. R. Co.*, 55 id. 661; *Story v. El. R. R. Co.*, 90 id. 146.) The "court commission" erred in receiving oral and unverified statements, in favor of the proposed railways. (*T. & B. R. R. Co. v. North. Turnp. Co.*, 16 Barb. 103.)

D. J. Dean for the Mayor, etc., respondent. The Rapid Transit Act (Chap. 606 of the Laws of 1875) does not provide for or permit the creation of a steam surface railway. (*In re N. Y. El. R. R. Co.*, 70 N. Y. R. 343, 352, *In re Gil. El. R. Co.*, id. 361, 366.) The construction and operation of the petitioner's road is prohibited by section 16 of chapter 252 of the Laws of 1884. (*In re Kings Co. El. R. R.* 20 Hun, 225; *Spring Val. W. Works v. Schottler*, 110 U. S. 347; *Tomlinson v. Branck*, 15 Wall. 460; *Beer Co. v. Mass.* 97 U. S. 25; *Beik v. Chicago R. R. Co.*, 94 id. 167, 176; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 62.) The proceedings set forth in the record are insufficient under the Rapid Transit act (Chap. 606 of the Laws of 1875) to entitle the petitioner to the confirmation of the report presented. (*In re Brooklyn, etc., R. R. Co.*, 72 N. Y. 245; *N. Y. & L. R. R. Co.*, 35 Hun, 220; 99 N. Y. 12; *Jenkins v. Union Turnp. Co.*, 1 Cai., Cases 94; *Crocker v. Kane*, 21 Wend. 211; *Hawes v. Aug. Sax. Co.*, 101 Mass. 983; *Atley v. U. Tool Co.*, 11 Gray, 139; *In re Trustees*, 57 How. Pr. 500; 80 N. Y. 642; *In re Em. Ind. Sav'gs Bk.* 75 id. 388; *Dillon on Mun. Corp.*, § 96; *Birdsall v. Clarke*, 75 N. Y. 73; *Thompson v. Schermerhorn*, 6 id. 92; *N. Y. & B. R. R. Co.*, v. *God-*

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win, 12 Abb. [N. S.] 26.) All the facts, showing inability to agree as to price of lands must be fully stated in the affidavits presented to the court, and the inability to agree must appear, otherwise the court has no jurisdiction to appoint appraisers. (*Dykman v. Mayor, etc.*, 1 Seld. 493; *In re B. H. & R. R. Co.*, 79 N. Y. 71; *In re Marsh*, 71 id. 319.)

Aaron J. Vanderpoel for respondents. It was the duty of the commissioners to locate the stations, landing places, buildings, platforms, stairways, etc. (*In re Kings Co. El. R. Co.*, 20 Hun, 234.) It was also their duty to fix and determine the time within which the consents should be obtained. (*Donahue v. O'Connor*, 45 N. Y. Supr. Ct. 278, 299.) The Act of 1875, chapter 606, was not intended to provide for surface roads. (*In re N. Y. El. R. Co.*, 70 N. Y. 343; 3 Abb [N. C.] 414; Laws of 1884, chap. 252; 1 R. S. 600, § 8; *White v. Syr. & U. R. R. Co.*, 14 Hun, 559; *Suydam v. Moore*, 8 Barb. 358; *Miller v. The State*, 15 Wall. 478; *Hyatt v. McMahon*, 25 Barb. 457; *Kerr v. Dougherty*, 79 N. Y. 327.) The legislature has authority to make grants of franchises or to confer powers, on the consent of parties who may in any wise be affected thereby. (*Brewster v. City of Syracuse*, 19 N. Y. 116, 118; *Tanner v. Trustees of Albion*, 5 Hill, 121, 131.) The fact that Guy R. Pelton was an applicant to the mayor to appoint a commission rendered him incompetent to act as a commissioner to determine whether the railways should be constructed, notwithstanding the refusal of the owners of property to consent thereto. (*In re Houston St.*, 7 Hill, 175; *Peninsular R. Co. v. Howard*, 20 Mich. 18; *Pond v. Town of Milford*, 35 Conn. 32; *Page v. Contoocook Valley R. R. Co.*, 21 N. H. 438; *In re Kings Co. El. R. R. Co.*, 82 N. Y. 99; *Corporation v. Manhattan Co.*, 1 Cai. R. 507, 508; *Anthony v. South Kingston*, 13 R. I. 129; *Ex parte Hinckley*, 8 Me. 146; *State v. Delasdernier*, 11 id. 473; *Wilson v. Mitchell*, 49 Wis. 284; *Brooks v. Hishen*, 40 id. 674; *In re Albany St.*, 6 Abb. Pr. 273; *Inhabitants v. Dilley*, 24 N. J. [4 Zab.] 209, 213;

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People ex rel. Cooke v. Com. of Highways, 57 N. Y. 549, 551; *Taylor v. County Comrs. of Worcester*, 105 Mass. 225; *In re Mt. Morris Square*, 2 Hill, 14; *In re B., N. & P. R. R. Co.*, 32 Hun, 289; *Hall v. Thayer*, 105 Mass. 219, 221; *Queen v. Aberdare Canal Co.* 14 Ad. & Ell. [N. S.] 584, 586; *In re Canada Northern R. Co.*, 7 Fed. Rep. 653, 655; *Shelton v. Town of Duley*, 27 Conn. 414; *Powers v. Bears*, 12 Wis. 213, 223; *Hazard v. Middletown*, 12 R. I. 227; *Peninsular R. Co. v. Howard*, 20 Mich. 18; *Mich. Air Line R. Co. v. Barnes*, 40 id. 383; *Fox v. Hills*, 1 Conn. 294, 300, 308, 309; *In re Hancock*, 27 Hun, 78; *Hall v. Thayer*, 105 Mass. 219; *Taylor v. County Comrs.*, id. 225; *Stephens v. People*, 18 L. J. 277; *People v. Mullin*, 3 Abb. L. J. 150; *In re B., N. Y., etc., R. R. Co.*, 32 Hun, 289; *People v. Brooklyn & Flatbush*, 89 N. Y. 75; *In re Grove St.*, 61 Cal. 438; *In re Newport Highway*, 48 N. H. 433; *Peck v. Freeholders of Essex*, 1 Zab. 656; *Mitchell v. Kirkland*, 7 Conn. 229; *People v. Landreth*, 1 Hun, 544; *Fox v. Hills*, 1 Conn. 294; *The Peninsular R. Co. v. Howard*, 20 Mich. 18; *People, ex rel. Vandeußen v. The First Judge of Columbia*, 2 Hill, 398; *Powers v. Bears*, 12 Wis. 213; *R. & S. R. R. Co. v. Budlong*, 6 How. Pr. 467; *Cooley's Const. Lim.* 563; *Redfield on Railways* 218, 219.) The proper time to make the objections was at the confirmation of the report. (2 Doug. [M.] 367; 1 Comp. L. 643.) There was no waiver. (16 Mich. 351; 15 Vt. 61; 2 Doug. [M.] 367; 1 B. Monroe, 213; 32 Me. 310; 47 id. 593; 6 Clarke [Ia.] 62; 1 Conn. 401.)

Wheeler H. Peckham for Madison avenue owners, respondents. The mayor's commission is alone authorized to impose conditions of any kind, and they must be expressed in the manner pointed out by the act. (70 N. Y. 358-359.) At the time of the passage of the act of 1884, the petitioner had not obtained the consent of the local authorities or of the property owners, and it is only *after* the routes are designated and these consents obtained, that the petitioner could become

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invested with the powers conferred by section 26 of the act of 1875. (70 N. Y. 348.) The petitioner was thus proceeding to obtain these powers when the legislature repealed the provisions under which it was acting. Such repeal is effectual. (*Falconer v. B. & J. Co.*, 69 N. Y. 491; *People v. Trustees*, 70 N. Y. 28.) Section 18 of the act of 1884, applies only to street surface railroad companies organized under special charters prior to the constitutional amendments of 1870. (21 N. Y. 461; *In re El. Road*, 70 id. 348.) Repeal of statutes, jurisdictional in character are absolute and nothing thereafter done, even though already commenced, has any validity. (*Butler v. Palmer*, 1 Hill, 330; *Smith v. People*, 47 N. Y. 338.) Whatever right the petitioner has under the law is much like the right of a public officer to future fees or emoluments. It is not property — not a right recognized by or the subject of law. (*Connors v. Mayor. etc.*, 5 N. Y. 296.)

Aug. S. Hutchins and *Waldo Hutchins* for Second Avenue Railroad Company, and others, respondents. The petitioner has no standing in court, not having been duly organized as a corporation. (*Donohue v. O'Connor*, 45 N. Y. Sup. 301; *N. Y. Cable Railway Co.*, 40 Hun, 15; *Birdsall v. Clarke*, 73 N. Y. 73. *In re Emigrant Ind. Sav'gs Bk.*, 75 id. 388; *N. Y. Cable Ry.*, 36 Hun, 358.) The object of the act of 1875 was to provide for the construction of elevated and underground railways. (40 Hun, 12.)

Grosvenor Lowry and *Abram Wakeman* for Thirty-fourth Street Railroad Company, and others, respondents. The consents required by the statutes must first be obtained before the location by the commissioners operates in any manner to confer any rights, inchoate or other. (*Gaylor v. Wilder*, 10 How. [U. S.] 493; *Kerr v. Doherty*, 79 N. Y. 327; Austin's Juris. 886-887.)

John M. Scribner for certain respondents. Chapter 606, Laws of 1875, does not authorize the construction of surface

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railroads, but clearly contemplates only elevated or underground railroads. (*In re N. Y. El. R. R. Co.*, 70 N. Y. 343, 346, 347, 352; *In re Gilbert El. R. R. Co.*, id. 336; *Stranahan v. Sea View R. R. Co.*, 84 id. 308-314.) Where a power is granted by legislative enactment, with a proviso annexed, the enactment is to be read as if no more power was ever given than is contained within the terms or bounds of the proviso. (*In re Second Ave. M. E. Church*, 66 N. Y. 395.)

James M. Varnum, for trustees of Gramercy Park and others, respondents. The fact that the commissioners appointed by the mayor both exceeded their powers and neglected to comply with certain mandatory provisions of the statute affected fatally all subsequent proceedings. (Laws of 1873, chap. 606, § 6; *Donohue v. O'Connor*, 45 N. Y. Supr. Ct. 301; *N. Y. C. R. R. Co. v. Forty-second St. & Man. R. R. Co.*; *In re Meth. Church*, 66 N. Y. 395; *In re Brooklyn R. R. Co.*, 72 id. 245; Rapid Transit Act, § 7; *In re N. Y. L. etc. R. R. Co.*, 35 Hun, 220; aff'd 99 N. Y. 12.) Chapter 606 of the Laws of 1875, conferred no authority upon commissioners appointed by the mayor to fix, determine or locate cable railways, or railways of any kind, upon the surface of a street, such as was done in this case. (*In re El. R. R. Co.*, 70 N. Y. 327, 373; 6 id. 366.)

RAPALLO, J. On the hearing of this motion at the General Term, the learned judges entertained different views. DANIELS, J., who delivered the principal opinion, was in favor of denying the motion on various grounds. He considered, in the first place, that the act under which the petitioner claimed to have been organized, commonly known as the Rapid Transit Act (Laws of 1875, chap. 606), did not authorize the construction of a railroad upon the surface of the land, but related only to elevated or underground railways; also that if the Rapid Transit Act ever did authorize the construction of surface roads, the General Surface Railroad Act of 1884 (Chap. 252, § 16),

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prohibited the erection of surface roads under the Rapid Transit Act, and abrogated any authority which the petitioner might previously have had to construct surface roads, and further that the commissioners appointed by the mayor, as prescribed in the Rapid Transit Act, had failed to comply with some of the requirements of that act which were essential to the legal organization of the petitioner as a corporation.

BRADY, J., concurred in only one of the propositions upon which DANIELS, J., based his conclusion, viz.: The proposition that the sixteenth section of the General Surface Act of 1884 abrogated the authority of the petitioner to construct a surface road.

DAVIS, P. J., dissented from the conclusion reached by both of his associates. The only point, therefore, which was decided at the General Term was, that the provisions of the General Surface Act deprived the petitioner of all power or authority to construct a surface road.

But the other points are still in the case and are urged on this appeal with great earnestness by the counsel for the various objectors who have argued before us and those who have submitted printed briefs, and numerous objections in addition to those discussed by DANIELS, J., are insisted upon.

As to a few of the routes designated by the mayor's commission, the General Term denied the motion to confirm the report of the Supreme Court commissioners, in the exercise of the discretionary power of the court in such cases, and its action with reference to those routes cannot, and is not sought to be reviewed here; but as to the residue of the routes the court has declared, in the order appealed from, that the motion was denied "solely and wholly on legal grounds and legal objections existing against the same, the petitioner being considered to have no legal right to construct or operate a railway on the streets and avenues last referred to."

This declaration in the order authorizes us to review the questions of law involved in the determination of the General Term, and seems to have been inserted with the view of inviting such an examination.

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We will first consider the point on which the majority of the justices sitting at the General Term agreed, viz. : The effect of the act of 1884 (Chap. 252, § 16), as abrogating the rights of the petitioner.

The language of that section is as follows : " Section 16. No street surface railroad shall be constructed to run in whole or in part upon the surface of any street or highway, under the authority of any commission appointed under the provisions of chapter 606 of the Laws of 1875, entitled 'An act further to provide for the construction and operation of a steam railway or railways in counties of the State,' or the acts in addition thereto or amendatory thereof."

The amendments to the Constitution, adopted in November, 1874, contained a provision (art. 3., § 18) that the legislature should not pass a private or local bill granting to any corporation, association or individual, the right to lay down railroad tracks. But it was further provided that the legislature should pass general laws providing for the cases enumerated in section 18, and that no law should authorize the construction of a street railroad, except upon the consent of property owners and of the local authorities, or in case the consent of property owners could not be obtained, the determination of three commissioners appointed by the Supreme Court, which determination should be confirmed by the court.

From the time this amendment took effect, January 1, 1875, until the passage of the General Surface Railway Act of 1884, there had been no law in force under which street railways could be constructed, except the Rapid Transit Act, the General Railroad Law of 1850 being inapplicable to street railways in cities, and no other general law having been passed as required by the Constitution. The Rapid Transit Act excluded the use of animal power to draw the cars, subdivision 4 of section 26 giving authority to companies organized under that act to "convey persons or property on their railroad by the power or force of steam, or by any motor other than animal power." No horse railroad, consequently,

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could be organized under that act. To provide a more complete system of street surface railways, the act of 1884 was passed. It dispensed with the machinery of a mayor's commission, and allowed companies to be formed by the voluntary association of the requisite number of persons, authorized them to select their own routes, provided the requisite number of property owners or a Supreme Court commission and the local authorities consented thereto, and did not exclude the use of either animal or steam power, but authorized the use of "animal or horse power, or any power other than *locomotive* steam power which might be consented to by the local authorities and a majority of the property owners," etc.

Having thus made provision for a system of street surface roads, more comprehensive even than could be claimed to be provided for by the Rapid Transit Act, the legislature naturally determined to make that system exclusive, and to have no more mayor's commissions for surface roads. But it was matter of public notoriety, that the commission which organized the petitioner had been at work since December, 1883. It had held numerous meetings in the city of New York, and had published notices of its proceedings from time to time as required by the act. It had determined upon the necessity of the road, had located the routes, had, after public notice, adopted plans for the construction of the roads, prepared articles of association, caused subscription books to be opened, after public notice, for subscriptions to the capital stock, and the whole of the capital stock, amounting to \$2,000,000, had been subscribed, and the fixed percentage thereof paid in cash; a board of directors had been elected, and the company organized, and the certificate of organization filed. All these acts were required by the act to be done before they could become a corporation. They were completed, before the passage of the General Surface Act of May 6, 1884, viz., on the 21st of April, 1884, and the plaintiff on that day became, in so far as the plans of the commissioners provided for surface roads, an existing street surface railroad company, provided in its organization it had

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conformed to the essential requirements of the Rapid Transit Act, a question which will be considered hereafter.

When the legislature passed the General Surface Railroad Act, and by section 16 made it the only law under which street surface railroads could thereafter be organized, I think that they intended to save the rights of all existing street surface railroad companies, even though they had been organized under the Rapid Transit Act; and that, with this view, section 18 of the General Surface Railway Act was inserted. That section provides that "nothing in the act shall * * * interfere with or repeal or invalidate any right heretofore acquired under the laws of this State by any *horse railroad company*, or effect or repeal *any right of any existing street surface railroad company to construct*, extend, operate and maintain its road *in accordance with the terms and provisions of its charter* and the acts amendatory thereof."

It is evident from the language of this section, that it was intended to save the rights of existing street surface railroad companies other than horse railroad companies, because, after in terms providing for horse railroad companies, it adds immediately after and in the same sentence the provision for the protection of *any existing street surface railroad company*, without restricting it to horse railroad companies. As there was no law except the Rapid Transit Act authorizing the formation of street surface railroad companies to be operated by any power other than horse power, the second branch of the saving clause must have been intended to embrace existing companies organized under the Rapid Transit Act.

An examination of the proceedings of the legislature discloses that the General Surface Railway Act was proposed to the legislature by the railroad commissioners, and as originally prepared and introduced on their recommendation, it did not contain the provisions of either section 16 or section 18, but they were both inserted by way of amendment. It is not unreasonable to infer that section 18, in so far as it relates to surface roads other than horse railroads, was intended for the

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express purpose of qualifying and restricting the sweeping provision of section 16.

Construed in the light of this saving clause, and in connection therewith, and bearing in mind the general principles relating to the construction of statutes as retroactive, I think the sixteenth section should be deemed to have prohibited only the construction of roads by companies thereafter organized under the Rapid Transit Act, and by authority thereafter given by commissions appointed in pursuance of that act, and was not intended to prohibit any company, theretofore organized and then existing, from exercising the corporate right and authority which it had acquired, to proceed with the construction of its road in accordance with its articles of association which had been framed by the commissioners and which constituted its charter, on complying with the conditions as to consents, imposed by the Constitution and by the Rapid Transit Act.

The saving clause which declares that section 16 shall not affect "*any right*" of any existing company to construct its road, is sought to be confined to cases where all the conditions required to be performed by the company before it can enter upon the streets and actually lay the tracks, had been performed, and it is contended that until such performance the company has *no right* to construct its road; that section 18 saves only a consummated and perfected right, which does not exist so long as any of the conditions imposed upon the exercise of the power conferred by the charter, remain unperformed.

I think this is too restricted a construction. The company, as was well known, had been for a long time engaged in having its routes determined and plans adopted by the mayor's commission and its articles of association framed. its stock subscribed and its capital in part paid in, all of which proceedings necessarily involved a large expenditure, and it had succeeded in maturing its organization and becoming an *existing company* provided its proceedings conformed to the act. If so it had acquired the corporate power and an inchoate right to construct its road, and all that remained to

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be done was to acquire the perfected right to enter upon the street and lay its tracks, which was, in substance, its right of way, by obtaining the consents of the local authorities and of a majority of the property owners or in lieu thereof the approval of a Supreme Court commission. I think the saving clause was intended to protect such right as the company had, though it was an inchoate right, and subject to the performance of further conditions. The statute does not say the perfected right but "any right," and although it was the intention of the General Surface Act to establish a uniform system for the future organization of street surface railroads, and to prohibit the future establishment of such roads under authority of the Rapid Transit Act, yet it was not intended to arrest the operations of a company already organized under that act, or to deprive it of the corporate rights and powers which it had acquired at great expense, in reliance upon the provisions of the act.

Although the effect of section 16 on the rights of the petitioner is the only point upon which a majority of the court below, in its opinions, agreed as a ground for denying the motion, yet its order was made generally on legal grounds and legal objections, and upon the general conclusion that the company had no legal right to construct or operate a railway on the streets and avenues in question. Any legal objection therefore, to the right of the company to construct its road is sufficient to sustain the order, and is open to the respondents on this appeal.

We must, therefore, consider the objection taken that the Rapid Transit Act did not authorize the construction of street surface railroads, but only of elevated or underground roads.

The Rapid Transit Act authorizes the commissioners appointed by the mayor, in the first place to fix and determine the route or routes, and declares that such commissioners "shall have the exclusive power to locate the route or routes of such railway or railways, *over, under, through or across* the *streets, avenues, places or lands* in such county, etc." This form of expression, "over, under, through or across,"

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is preserved throughout the act and is often repeated, and it is claimed on the part of the appellant that the word "through" the streets refers to surface roads, and is used in contradistinction to *over* and *under*. On the other hand many provisions and requirements of the act are referred to which are applicable only to elevated or underground railways, such as those of section 5, in regard to "supports," "stations," "stairways," "elevators." Those of section 17, in regard to "depots," and those of section 26, subdivision 5, respecting "foundations," "columns," etc., and from this it is argued that only elevated or underground railways were contemplated or intended to be authorized by the act. But a similar line of argument can be used, and with equal force, in support of the contention that the act intended to provide for surface roads as well as for underground and elevated roads. Section 26, subdivision 3, authorizes the crossing of and intersection with other railroads before constructed, but subdivision 5, of the same section, contains these exceptions: "Except that nothing in this act shall authorize the construction of a *railway* crossing the track of any steam railway now in actual operation *at the grade thereof*, or the erection of piers or supports for any *elevated* railway upon a railway track now actually in use in any street or avenue." Section 29 authorizes conductors in case a passenger refuses to pay his fare, to put him out of the car at any usual stopping place or *near any dwelling-house*. Section 35 provides that where the route "shall intersect, cross or coincide with any horse railway track occupying the surface of said streets," the company may, for the purpose of constructing its work, temporarily remove the tracks of the horse railway, but "nothing contained in this act shall authorize any corporation, formed thereunder, *to use the tracks of any horse railway*." By section 4 certain streets and places are exempted from having any railroad constructed therein, and in 1881 an act was passed (Chap. 485, Laws of 1881) amending the Rapid Transit Act, providing that when any route designated by mayor's commissioners is located "over or on" any street

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thus exempted the commissioners shall have power to substitute a location over, under, through or across any street not exempted, in the same general direction as the exempted street.

It is obvious that some of the provisions of the act are applicable exclusively to elevated or underground roads, and others exclusively to surface roads, and that such is necessarily the case where it is intended to provide for both classes of roads in a single act.

Although we may presume, from the history of the time, that the legislature had most prominently in view the securing of rapid transit by means of elevated or underground roads, yet the main object sought was rapid transit in any way it could be obtained, and in framing their act they made it sufficiently broad to include surface roads.

The act gives full power to the mayor's commissioners to decide upon the plans on which the roads shall be constructed, and contains no restriction which excludes from their adoption the plan of a surface road.

The object was to obtain some better motor than horse power, and, therefore, the act authorized steam or "any motor other than animal power. (§ 26, subd. 4.) The legislature might well trust to the local authorities, the property owners and the commissioners appointed by the mayor and those appointed by the Supreme Court, not to consent to the use of steam locomotives on the surface of the streets, and they did not in terms prohibit them, as is done in the General Surface Railway Act, which allows any power except that of a steam locomotive, including every other mode of propulsion by steam or other power, which may be consented to by the local authorities and the property owners. I think that before the passage of the General Surface Railroad Act a corporation could be legally organized under the Rapid Transit Act for the construction and operation of a street surface railway. That such was the view entertained by the legislature appears from their enacting section 16 of the General Surface Act prohibiting the future construction of surface roads under

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authority of the Rapid Transit Act, except in the case of existing companies.

Section 40 is relied upon as contradictory of this interpretation. It provides that this act (the Rapid Transit Act) shall not be construed to repeal or affect the general railroad law of 1850, nor shall any of its provisions apply to any railroad company organized under any general or special law of this State for the purpose of constructing a steam railroad upon the surface of the ground, nor to the operation or management of any such railroad heretofore constructed. I do not think that this section is in any respect inconsistent with or contradictory of the argument that the Rapid Transit Act itself authorized the construction of a steam railroad on the surface. The meaning of the section, as I understand it, is that none of the provisions of the act shall apply to any surface railroad company already organized at the time of the passage of the Rapid Transit Act, under any general or special act, nor to the operation of any surface railroad constructed before the passage of the Rapid Transit Act. This concluding sentence of the section rather confirms the view that the act was understood by the legislature to apply to surface roads constructed under its provisions, by declaring in terms that none of its provisions shall apply to the operation or management of any surface road constructed before its passage.

This brings us to another class of questions which present serious difficulties. They relate to the organization of the petitioner as a corporation. Unless validly organized in pursuance of the Rapid Transit Act, it acquired no right to construct the road, and, consequently, could not demand that the Supreme Court confirm the report of its commissioners as a substitute for the consent of a majority of the property owners, and the order of confirmation would be of no avail if granted.

As no power, authority, or franchise is conferred directly by the legislature on the petitioner, but the act only prescribes the proceedings by which such rights can be acquired, a substantial compliance with the material requirements of the

act is a condition precedent, without performance of which the petitioner never became legally incorporated or acquired any rights under the act.

The general scheme of the act, omitting details, is that the public necessity for the steam railway or railways sought to be constructed in the county, shall be established by the determination of commissioners to be appointed, in cities by the mayors thereof, on the verified petition of fifty reputable householders and taxpayers of the county, and to organize as a board.

Upon the determination by such commissioners that the road is necessary, they are required to fix and determine the route or routes, and they are declared to have the exclusive power to locate the route or routes of such railway or railways, over, under, through, or across the streets, avenues, places, or lands in such county, excepting certain designated streets and avenues and also public parks and public buildings (§ 4).

The commissioners must also meet and decide upon the plan or plans for the construction of the railway or railways, with the necessary supports, turn-outs, switches, sidings, connections, landing places, stations, buildings, platforms, stairways, elevators, telegraph and signal devices, or other requisite appliances upon the route or routes and in the location determined by them (§ 5).

They must also fix and determine the time within which such railway or railways, or portions of the same, shall be constructed and ready for operation, together with the maximum rates for transportation and conveyance and the amount of capital stock, etc. (§ 6).

They must then prepare articles of association for the company to be formed. These articles must set forth and embody, as component parts thereof, the several conditions, requirements and particulars determined by the commissioners pursuant to sections 4, 5 and 6, and must further provide for the release and forfeiture to the supervisors of the county, of *all rights and franchises acquired by such corporation in*

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case such railway or railways shall not be completed within the time and upon the conditions therein provided. They must also open books for subscription to the capital stock after due public notice (§ 7).

When the whole capital stock has been subscribed and the percentage prescribed by the commissioners has been paid in cash, the subscribers are to meet for organization and elect directors, and thereafter the commissioners are to deliver to the directors a certificate, in duplicate, of the organization of the company, setting forth the articles of association. Three of the directors are then to make affidavit, in duplicate, that the full amount of stock has been subscribed in good faith, and the prescribed percentage paid in cash, and that it is intended in good faith to construct, maintain and operate the railway or railways in the articles of association mentioned. The certificates and articles are to be filed in the office of the secretary of state and a duplicate in the office of the clerk of the county wherever the railway or railways shall be located, and *thereupon* the persons who shall become stockholders, shall be a corporation.

The observance of all these essential requirements is, therefore, a condition precedent to a company of this description becoming a corporation, or acquiring the right to exercise any of the powers conferred upon such corporations by the Rapid Transit Act.

The respondents claim that the petitioner has failed, in many respects, to comply with the requirements. The principal objection discussed in the opinion of DANIELS, J., at General Term, is that the mayor's commission did not "fix and determine the time within which such railway or railways or portions of the same, shall be constructed and ready for operation" as required by section 6 of the act.

The commissioners disposed of the subject in the following manner: They required separately as to each of the twenty-nine different routes which they had located, that it should be constructed and ready to be operated within a specified number of months or years "from the date of the obtaining of the con-

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sent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having control of, that or those portions of streets or highways upon which it is proposed to construct and operate such railway or railways, or, in case the consent of such property owners cannot be obtained, from the date of the confirmation by the court of the determination of three commissioners appointed by the General Term of the Supreme Court in the first judicial district, that such railway or railways ought to be constructed and operated, provided that the date of such confirmation be the same or subsequent to the date of the said consent of such local authorities." After specifying in regard to the twenty-nine routes respectively, periods varying from eighteen months to five years from the date of the consents, they added the following general provisions, viz. : First. " Resolved that each of the said periods and limitations of time hereinbefore referred to, and prescribed as the time within which the several sections or portions of railway or railways shall be constructed and be ready to be operated is, however, subject to this proviso and reservation as follows : The time, if any, unavoidably consumed by the pendency of legal proceedings or by the interference of the public authorities, or by omission to open or grade, or delay in opening or grading any street or avenue or any part or parts thereof, shall not be deemed a part of any period of time within which construction and completion of the railway or railways is required to be made. But the time, if any, during which such unavoidable delay shall continue shall be added to each of the periods hereby otherwise limited for construction and completion of the railway or railways ;" and, secondly, " Resolved that it is the intent of the board of commissioners that the consents of the property owners and of the local authorities specified in section 4 of chapter 606 of the Laws of 1875, as amended by chapter 485 of the Laws of 1881, and, if necessary, the determination of commissioners to be appointed by the General Term of the Supreme Court, and the confirmation of such determination by the court, shall be obtained with all due diligence."

It is contended, with considerable force, by the respondents,

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that as the time fixed by the commissioners only begins to run at the date of the obtaining of the consents, etc., and no time is limited for obtaining such consents, and the only restriction in respect to time is that due diligence shall be used for the purpose of obtaining them, there is no actual limitation of the time within which the roads are to be constructed, and the commissioners have done little more than to require that they be completed with due diligence. It is claimed that the act contemplated that a definite time should be fixed by the commissioners so that it might readily be ascertained when the rights of the petitioner terminated, and their powers and franchises might be devolved upon some other company who would supply the public necessity of rapid transit.

I have, with some hesitation, come to the conclusion that the commissioners substantially complied, in this respect, with the Rapid Transit Act. That it is reasonable to consider that the intent of the act was that companies formed under the act should be limited in respect only to time during which it was possible for them to prosecute the work, and that time when legal barriers existed to their so doing, should not be counted. The act itself provides (§ 38), that "the time, if any, unavoidably consumed by the pendency of legal proceedings, shall not be deemed a part of any period of time limited by this act," and subsequent acts recognize the principle that only *available* time should be considered. The General Surface Railway Act (Laws of 1884, chap. 252), limits the time for the commencement of the construction of the roads thereby authorized, to one year, and the time for their completion to three years after they have acquired the consent of the local authorities and that of the property owners, or the determination of the General Term. And it further authorizes the Supreme Court to extend their time during the pendency of legal proceedings.

It thus appears that the legislature, when itself undertaking to perform the duty, which by the Rapid Transit Act it had devolved upon the commissioners, of determining the time

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within which street railroads should be constructed, adopted the same course as that adopted by the commissioners in this case, and it would seem to be in accordance with the spirit of the act. If the object was to secure the speedy construction of these roads by opening the door for some other company to come in and construct the road in case the first one organized failed to do so with promptitude, that object would not be advanced by causing a forfeiture of the franchises of the company first formed, for causes which would operate on any company which might follow it. There was ample remedy for any delay which due diligence could obviate, and which was not unavoidable. The company would be subject to a forfeiture of its franchises for not complying with the conditions of its charter, and also to the more summary punishment of a legislative repeal of such charter. These considerations induce me to regard the limit of time as determined by the mayor's commission, a sufficient compliance with the act.

A further objection is taken that the articles of association framed by the mayor's commission do not conform to the requirement of section 7 of the act, which is very explicit in its terms. It requires that the articles of association shall set forth and embody the determinations of the commissioners, pursuant to sections 4, 5 and 6, and "further shall provide for the release and forfeiture to the supervisors of the county, of all rights and franchises acquired by such corporation, in case such railway or railways shall not be completed within the time and upon the conditions therein provided." This provision is thus made an essential part of the articles of association.

The provision in respect to forfeiture, actually contained in the articles of association of the petitioner, instead of providing, as required by the act, for the release and forfeiture to the supervisors of the county of *all the rights and franchises acquired by* the corporation, in case the railway or railways shall not be completed in time, provides only (art. 10) that "in case the several portions of such railway or railways

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shall not be completed, each within the time and upon the conditions hereinbefore for it provided, the rights and franchises acquired by said corporation, *for and as to any portion of such railway or railways not so completed*, shall be released and forfeited to the supervisors of the county of New York."

This is a very material departure from the requirements of the act. The mayor's commissioners had laid out twenty-nine different routes, some longitudinal, extending the whole length of the city on the easterly and westerly sides thereof, and some transverse, crossing from east to west, some long routes and some short, some elevated and some surface roads, some running through the thickly settled and some through the sparsely inhabited portions of the city, the aggregate length of the roads being upwards of seventy miles.

Whether the Rapid Transit Act contemplated that the entire rapid transit business of the city should be concentrated in the hands of a single company, I cannot undertake to say. The act was such that it was theoretically, at least, capable of giving sanction to such an organization, though the practical difficulties in the way of complying faithfully with its requirements in devising a scheme, on such an extended scale, were very great. One thing, however, is very clear. It was not intended to sanction the organization of a company which could acquire the franchise of building all the conceivable roads now required, or which might be required for years to come, in the city of New York, and holding it for an indefinite time over that city, thus keeping off all smaller companies which might be required in particular localities, and retaining in itself the monopoly of the rapid transit business. The intention was that no franchise should be acquired to build a road, or set of roads, unless it was the actual intention of the promoters actually to build them and complete them within a limited time, and no road was to be authorized which was not intended to be thus constructed, and to secure this end the act contained stringent provisions. Before a corporation could be finally organized under the act it was required to file an affidavit of three of its directors that the full amount of stock

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had been subscribed and the prescribed percentage paid in cash and that it was intended in good faith to construct, maintain and operate the railway or railways in the articles of association mentioned (§ 9). This refers to *all* the railways mentioned in the articles and not merely to a portion of them. The sixth section required the times within which the several portions of all the roads mentioned in the articles should be completed, and the seventh section for the forfeiture and release to the supervisors of *all* the rights and franchises in case the railway or *railways* (meaning all of them) shall not be completed within the appointed time.

Under the article as framed by the commissioners, the company was left at liberty to select which of the twenty-nine routes it would complete and which it would not, without any reference to the interests of the public and without the action of the company being subject to revision or control. As to many of the routes it had five years, after obtaining the necessary consents, to determine whether it would construct them, and during all this period they would hold the shadow of their exclusive franchise over the neighborhoods affected, and if they finally concluded to abandon those routes they were to suffer no penalty except to forfeit to the supervisors of the county the franchise of constructing the routes which they elected to abandon. This was not in accordance either with the letter or spirit of the act. The mayor's commissioners were sworn public officers, presumed to be disinterested, and placed in office for the purpose of protecting the public interests, and it may well be presumed that in fixing routes they would locate some which it would not be to the immediate interest of the company to construct, but for which they would be compensated by the franchise being coupled with a highly profitable route, the right to construct which would insure the construction of the others. By the device resorted to, if it were sanctioned, they would be left at liberty to determine all these matters for themselves without anything to guide them but their own interest.

In 1882 this very subject was before the legislature, and

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they amended section 7 of the Rapid Transit Act by adding the following: "Provided, however, that a failure by any corporation heretofore or hereafter organized under this act, to complete its railway within the time limited in and by its articles of association, shall work a forfeiture of the franchises of such corporation, only with respect to that portion of its route which such corporation shall have failed to complete, and shall not affect the rights and franchises of such corporation to construct and operate such part of its railway which it shall have completed within the term prescribed by its articles of association, or as to which the time for completion shall not have expired, anything contained in the articles of association of such corporation to the contrary thereof in anywise notwithstanding." (Laws of 1882, chap. 393, § 2.) But by section 5 of the same act it was expressly provided that none of its provisions should apply to the counties of New York and Westchester, thus emphasizing the legislative will as declared in the original act, that in those counties a rapid transit company should be required to obligate itself to construct all the roads mentioned in its articles of association under the penalty of a transfer of all its franchises to the supervisors of the county.

The commissioners, therefore, in framing article 10 of the articles of association, attempted to override the action of the legislature in refusing to make the amendment of 1882 (Chap. 393, § 2) applicable to the city of New York, by incorporating the substance of the amendment in the articles of association of the petitioner, which they were authorized by law to prepare.

To this objection it is answered that the provision in the articles of association required by section 7 was superfluous and unnecessary, because the law would execute itself though nothing were said in the articles on the subject of forfeiture. The difficulty in the way of this answer is that there is no provision of law declaring a forfeiture to the supervisors or requiring a release to them. The only legislative enactment on that subject is the requirement of section

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seven that the articles of association shall contain a stipulation or provision to that effect, and that requirement is positive and unequivocal and cannot be disregarded.

The general laws applicable to corporations would doubtless authorized the attorney-general to proceed by *quo warranto* for a forfeiture of the charter of the petitioner in case it should unreasonably delay or omit to exercise its franchises. But that would be a different kind of forfeiture from that mentioned in section 7. It would be a destruction of the franchises and not a transfer of them to the supervisors, and the act having made a specific provision on the subject, no other can be substituted.

It is further said that this requirement is not applicable to the city and county of New York because the board of supervisors of that county was abolished prior to the passage of the Rapid Transit Act, viz., in the year 1870. (Laws of 1870, chap. 190.) This, I think, is a misapprehension.

By section 11 of the act referred to, the board of supervisors, composed of supervisors theretofore elected by the people or appointed by the mayor, was declared abolished from and after the first Monday of July, 1870. But from that time all the powers and duties conferred by general or special laws upon the board of supervisors of the city or county of New York, or upon any supervisor thereof, and all the obligations of the abolished board of supervisors were declared to belong to, be devolved upon, and thereafter fully possessed, and required to be exercised, by the board of supervisors constituted by that act or by any supervisor thereof, and by section 1 of the act the mayor and the recorder of the city of New York, together with the aldermen to be elected under the act to reorganize the local government of the city of New York, (Laws of 1870, chap. 137), were declared, on and after the first Monday of July, 1870, to compose the board of supervisors of the county of New York, and each of said officers to be a supervisor of said county.

The Constitution requires (Art. 3, § 22) that there shall be in the several counties a board of supervisors to be elected in

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such manner as may be prescribed by law, except in cities whose boundaries are the same as those of the county, but that in any such city the duties and powers of a board of supervisors may be devolved upon the common council or board of aldermen thereof, and certain duties are imposed upon the board of supervisors of the city and county of New York, which require that such a body be maintained in that county (Art. 3, § 3).

It cannot be claimed, therefore, that in the city and county of New York, there are no supervisors to whom the franchises of the company can be forfeited and released.

It is further contended, with much force, on the part of the respondents, that the plans for the construction of the roads are fatally defective and in many respects fall far short of a substantial compliance with the requirements of the Rapid Transit Act.

The points made on this subject in the briefs submitted by the various counsel for the respondents are so numerous that it would be impracticable, within any reasonable limits, to discuss all of them. I shall therefore select a few of those which I regard as prominent.

That it is essential to the formation of a corporation, under the Rapid Transit Act, that the commissioners appointed by the mayor should decide upon some plan for the construction of the railway or railways located by them, cannot be doubted. The distinguishing feature of the act is that the company to be organized is not left at liberty, as are railroad companies formed under the General Railroad Act, and as were those which formerly were created by special acts, to decide for themselves upon the plan of construction, but that subject was placed under the exclusive control of the commissioners, in addition to the exclusive power to locate the route or routes. The power thus vested in the commissioners to decide upon the plan of construction, was rendered necessary by the peculiar character of the roads authorized, which doubtless were principally intended to be located in populous cities, and might seriously affect valuable private rights. The extent of injury

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to these private rights would necessarily depend, in a great degree, upon the manner in which the roads, and especially the elevated roads, should be constructed and operated. The necessity for increased facilities for transportation in large cities, and especially in the city of New York, was the spring which set in motion all these schemes, and when it was sought to have them forwarded by legislative sanction, the problem was to secure the greatest benefit to the public, with the least injury to private rights. It was not safe to organize private corporations with unrestricted power to construct these roads on any plan which economy and a regard solely to their own interest might suggest, and, therefore, the expedient was resorted to of the appointment by the local authorities of a board of sworn commissioners, who should give security for the faithful performance of their duties, and have power to stand between the projectors of the enterprise and the property owners and the public, and decide upon the plans which they should deem most just with reference to all these diverse interests.

This leads us to the inquiry into the extent, to which it is essential to the validity of an organization under this act, that the commissioners should exercise the power of deciding upon the plans of construction.

To begin at the foundation, I think it incontestable that they must decide whether each contemplated road shall be an underground road, an elevated road, or, if I am right in my construction of the act, a surface road. To leave either of these questions undetermined, and relegate it to the discretion of the directors of the company to be formed, would, in my judgment, be a departure from the act and a failure to comply with one of the conditions precedent to the acquisition of corporate power.

How far further it is essential, for the purpose of securing a valid organization, that the commissioners should decide upon plans of construction, it is difficult to determine. It would be very inconvenient, to say the least, to require that the details of the construction should be prescribed with the

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minuteness of the usual specifications in a building contract. There undoubtedly is a line somewhere, dividing the essential from the non-essential. But we are not put to the necessity of searching for it in the present case. It is sufficient for its purposes to hold that, as far as reasonably practicable, the plans adopted by the commissioners should disclose to what extent the streets are to be encroached upon, and the property abutting thereon affected, and the means of transportation to be used, so that the local authorities and the property owners when applied to for their consents, or the commissioners appointed by the Supreme Court with authority to consent in their behalf, may have the necessary materials to form an intelligent judgment whether the scheme proposed should or should not be assented to. To this extent, at least, I think the act requires that the commissioners appointed by the mayor should decide upon the plans, and that their decision should not be made subject to any modification by the railroad company. That those who consent to the construction of the road, whether they may be the local authorities, the property owners, or the Supreme Court commissioners, may know to what kind of road they are consenting, to what degree the streets will be obstructed thereby, of what efficiency the proposed mode of construction is capable, and that their consents cannot be used for the construction of any different road.

Justice seems to require that to this extent the commands of the statute be obeyed.

The routes laid out by the commissioners have been stated. Of these several, and indeed the principal ones, are, according to the plans adopted by them, to be surface roads. But as to several of the others, and indeed a portion of those designated in the first instance as surface roads, it is, by the resolutions of the commissioners, which are embodied in the articles of association of the company, left to the subsequent election of the company whether they shall be surface or elevated roads. A more flagrant violation of the statute can scarcely be conceived.

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Article 7, of the articles of association, which embody, as directed by the statute, the determinations of the mayor's commissioners, provides (subd. 1), that the railways to be constructed by the company shall be laid upon the surface of the streets or avenues, *excepting* on route No. 1, from Great Jones street to the Brooklyn bridge; No. 2, from West street to Thirty-third street and Tenth avenue, and from Second street to the northerly terminus of the route; on route No. 4, on route No. 26, and route No. 29, from Christopher street to Seventy-second street; all of which routes *may be* constructed on elevated structures. These routes comprise a very important part of the general schemes of the projected roads, and in the aggregate cover a space of upwards of seventeen miles in length, and yet the plans adopted by the commissioners do not determine whether they shall be elevated or surface roads, but leave that question to the decision of the company.

The third subdivision of article 7 provides that the elevated railways shall (with one small exception), be double track, but authority is given to add such other tracks as may from time to time be needed to accommodate increasing traffic, and to make such additions to the structures as may be needed for that purpose.

Subdivision 6 of the same article provides that the tracks of railways, when elevated, shall be carried either by longitudinal girders resting on the tops of columns or by transverse girders supported by columns, without determining which, or prescribing the height of the columns, except that the superstructure shall not be less than fourteen feet above the level of the streets (subd. 15).

Subdivision 7 declares that the plan of construction of the elevated railways having authority for more than two tracks, which is the case with all the routes except one, shall be *at the election of the company constructing the railway*, either with a row of columns on the line of each curb and a superstructure carrying one or more tracks upon transverse girders spanning the street, or with a row of columns upon the line

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of each curb and a single track over each row of columns; authority being granted to add to the structure when an additional track or tracks may be needed, transverse girders between said rows of columns to support such additional track or tracks, or with a row of columns on the line of one curb and a row in the roadway of the street with authority on some streets to erect a third row in the roadway of the street for additional tracks when needed.

The power to erect stations and platforms is not restricted or defined. The company is left, by subdivision 14 of article 7, to decide where they are necessary, and to erect them over the cross streets and also to occupy so much of the sidewalks of the streets for stairways and approaches "as may be necessary," thus leaving it to the company to determine how much of the streets it will occupy, and subdivision 41 gives authority to construct "such supports, turn-outs, switches, sidings, connections, landing places, stations, buildings, platforms, stairways, elevators, telegraph, telephone and signal devices, and such other requisite appliances as shall be proper for the purpose of such railway and as shall be necessary for the convenient use of the same."

The details enumerated in this subdivision are the same which are enumerated in subdivision 5 of the act, and of which the commissioners are therein required, after giving public notice inviting the submission of plans, to decide upon the plan of construction, and yet, instead of adopting any such plan, they leave these matters to be determined by the company under a general authority to construct these appliances as may be proper and necessary for the convenient use of the railways.

Numerous other objections are made and elaborated in the points. Many criticisms are made with reference to the surface portions of the road, showing, as it is claimed, that no definite plan was adopted even for the construction of these portions of the railways, but that it was in substance left to the company to select what they should deem the most approved form. It is not necessary to go now into all these

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details, as I think the particulars which have been specially referred to are sufficient to dispose of the case without passing upon the many other points made on the part of the respondents, and to show that the commissioners, instead of adopting definite plans of construction, obligatory upon the company, have left it at liberty to determine for itself many of the questions in which the local authorities and property owners are interested, and the determination of which was essential to enable them, or any commission appointed by the Supreme Court to form an intelligent judgment whether or not consent should be given to the construction of the railways, and especially they have virtually left it to the company to determine how much of the streets it will occupy, and to extend this occupation from time to time as its interests may require. In this respect it seems to me that the projectors of the road, and the commissioners, have failed to appreciate the spirit of the Rapid Transit Act, and the protection it was intended to afford to the public and the property owners. Experience has shown that an elevated road is capable of being constructed on such a plan as to interfere, to a comparatively slight extent, with the use of the streets for ordinary purposes, and with the rights of owners of property abutting thereon; but they may also be constructed in such a manner as virtually to destroy the value of such property. The scheme of the act was to withhold from companies, formed under it, the right to determine upon these plans, and to vest that power in an impartial board of sworn commissioners, and yet, as has been shown, these commissioners have relegated to the company itself the power of deciding questions which it was their duty to determine, and even to change and enlarge their plans from time to time, as their interests may render desirable. A single observation is sufficient to illustrate this point. By the so-called plan adopted by the commissioners the company is authorized, in several instances, to elect between a surface and an elevated railway, and, where they elect the elevated, to lay tracks on columns at each curb, or at its election to lay transverse

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girders from curb to curb, spanning the entire street. On these girders it purports to be empowered to lay additional tracks from time to time, without limit, as its business may require. It may, therefore, at its election, cover the entire roadway of the streets, or it may construct additional tracks on columns in the center of the roadway. It may erect stations over the sidewalks and cross streets and may occupy as much of the sidewalks as it may deem necessary for stairways, or approaches, without any restriction. The number and location of stations is not limited or defined, and all these structures over and in the roadway and on the sides may be carried to an unlimited height, so as practically to efface the buildings on the sides of the streets, the only limit being that the superstructure shall not be less than fourteen feet in height. In leaving the company at liberty to determine all these matters, and change the plans from time to time accordingly, the commissioners have undertaken to enable it to exercise powers far more expansive and unrestricted than those which the Rapid Transit Act intended to confer.

As the views I have expressed do not in all respects meet the concurrence of all my associates, I have stated separately the conclusion which I have reached, in order that it may be ascertained what points are decided. These conclusions are:

First. That section 16 of the General Surface Act, construed in connection with section 18 of the same act, did not abrogate the right and power of the petitioner, if in other respects legally organized, to proceed to obtain the requisite consents, and when obtained to construct the railways in conformity to their articles of association.

Second. That the Rapid Transit Act did, before the passage of the General Surface Act, authorize the organization of companies to construct street railways on the surface, to be operated by any power other than animal.

Third. That the objection that the organization of the plaintiff is defective on the ground that the commissioners failed to fix the time for the completion of the railways, is not well taken.

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Fourth. That the objection is well taken that the articles of association, prepared by the commissioners, fail to comply with section 7 of the Rapid Transit Act, in that they do not provide for the release and forfeiture to the supervisors of the county, of all the rights and franchises acquired by the company, in case of its failure to complete its railways within the prescribed times.

Fifth. That the commissioners have failed to substantially comply with the requirement of section 5 of the act, to decide upon the plan for the construction of the railways and other appliances specified in that section, and that such compliance was essential to their valid organization.

Sixth. That the order of the General Term should be affirmed.

RUGER, Ch. J., MILLER, DANFORTH and FINCH, JJ., concur.

ANDREWS, J., concurs on the third, fourth and fifth grounds stated in the opinion, and does not vote on the first and second grounds.

EARL, J., concurs on the third, fourth and fifth grounds stated in the opinion, and dissents from the first and second grounds.

Upon a subsequent motion for a reargument the following opinion was handed down :

RAPALLO, J. The petitioner in this matter moves for a reargument of the appeal herein, alleging as one ground for such motion, that since the decision of this court on such appeal it has obtained from the General Term of the Supreme Court an order to show cause why the report of the commissioners appointed by it should not be remanded to them for further hearing, which order to show cause is now pending, and that in order to comply with the opinion of this court, the petitioner has taken proceedings for the amendment of its articles of association by inserting therein an amended article 10, in relation to the forfeiture of its rights and fran-

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chises to the supervisors of the county, and that to further comply with such opinion the petitioner has by resolution of its board of directors requested the president of the board of commissioners, appointed by the mayor, who framed the said articles of association, to call a meeting of the said commissioners for the purpose of correcting the defects and supplying the omissions pointed out in said opinion. That the president of said board of commissioners had reconvened them, and they have further determined as to the plans for the construction of the petitioner's railway, and have amended them in the particulars mentioned in the opinion, and the petitioner is willing to do such other things as may conform to the judgment of this court.

The petitioner claims that the functions of the mayor's commission have not expired, but were continued and were still existing at the time of this amendment, said commission having at its meeting in June, 1884, reserved the right to reconvene at the call of its president; that the times fixed by the Rapid Transit Act for the performance of the several acts to be performed by the mayor's commission were not mandatory but merely directory; that under the circumstances of this case they could be performed at the time of the amendment, and that the amendment of the articles of association was authorized by chapter 135 of the Laws of 1870, which empowered corporations formed under general laws to amend their certificates of incorporation in case of any informality therein.

Many grave objections are suggested to the validity of these proceedings to amend; but they cannot be considered on this motion. Even if the proceedings to amend were effectual, they would not afford ground for a reargument of the appeal. The jurisdiction of this court is confined to a review of determinations actually made by the Supreme Court, and this review must be had upon the same papers which were before the General Term. We cannot rehear the matter upon a different state of facts from those upon which the General Term acted, for that would be an exercise

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of original jurisdiction on the new state of facts presented, and not a review of the actual determination of the court below.

If a new state of facts, giving rise to new questions, and obviating the legal objections which existed to the application originally made by the petitioner, is now presented (a question which is not now properly before us, and upon which, therefore, we do not express any opinion) the order made by this court affirming the order of the General Term denying the application of the petitioner, will be no obstacle to a rehearing of the matter at the General Term on the alleged new state of facts, should that tribunal see fit to grant such a rehearing, or to a new application based upon new facts. (*Riggs v. Pursell*, 74 N. Y. 370.) And on such hearing, or new application, if the legislation of 1884 has not precluded the petitioner from proceeding under the Rapid Transit Act to obtain authority through the action of a mayor's commission since 1884, to construct a surface road, it will be open to the Supreme Court to exercise its discretionary power over the whole matter or to pass, as it did in the first instance, only on questions of law. We, however, cannot make any modification of our decision, or any order in the matter, based upon the alleged change of facts, or alleged amendment of the proceedings of the mayor's commission and of the articles of association.

Some other grounds, however, are urged in support of this application for a reargument, which will be briefly noticed:

First. It is alleged that the articles of association of the petitioner were prepared upon the model of the articles of association of the Manhattan Elevated Railway Company, which company is said to have been organized under the Rapid Transit Act. On this point it is sufficient to say that the articles of association of the Manhattan Elevated Railway Company have never been before this court, nor have we any judicial knowledge of their provisions, or their existence, unless they came incidentally in question in the *Matter of the Gilbert Elevated Railroad Company* (70 N. Y. 361). They are not even mentioned, either in the arguments of counsel or

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in the opinion of the court in that case. None of the questions involved in the decision of this case were discussed in that case, nor was the attention of the court called to any of them if they existed. The sufficiency of those articles has not been litigated or considered in any case which has been before this court.

Second. It is claimed that from the opinion in this case, the court appears to have overlooked its decision in the *Matter of the New York Elevated Railroad Company* (70 N. Y. 327). That case was fresh in the memory of the court. Several of the judges who participated in its decision, including the judge who delivered the opinion, having concurred in the decision of the present case, and we are unable to find that any point decided or discussed in that case, conflicts with the decision in the present one in any particular. In so far as the validity of the organization of the present petitioner is concerned, it is impossible that there should be any such conflict, because the New York Elevated Railway Company was not organized under the Rapid Transit Act. (Chap. 606 of the Laws of 1875.)

The New York Elevated Railway Company was originally incorporated under the General Railroad Law of 1850, and the Supplementary Act of 1866. It was recognized as an existing corporation, by chapter 595 of the Laws of 1875, entitled "An act to authorize and require the New York Elevated Railroad Company to continue and complete its railroad in the city of New York and to regulate the construction, operation and management thereof." That act recited the incorporation of the Elevated Railway Company under the General Law of 1850; that it had acquired by purchase, under foreclosure of a mortgage, the powers and franchises of the West Side and Yonkers Patent Railway Company, and was, by the act last referred to, confirmed in the possession and enjoyment of said rights and franchises; and the powers of certain commissioners previously appointed were extended to it; and prior to the passage of the Rapid Transit Act it had constructed and was actually operating an elevated steam railway on a portion of its route. After the passage of the Rapid

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Transit Act it proceeded under section 36 of that act to make certain connections and additions to its route, and no question could arise in the case except with respect to those connections. But even as to those, nothing was discussed in the opinion, or decided, which touches the present case. The only point claimed in the papers on the present motion to have had that effect, is that while the mayor's commissioners had given to the elevated railway company authority to elect between several specified plans for the construction of a certain portion of the connections, the Supreme Court commission had imposed as a condition that the company be confined to one of the specified plans, unless the property owners should consent, and the point made was, not as to the action of the mayor's commissioners in giving the right of election, but as to that of the Supreme Court commission, which it was said exceeded its powers in imposing the condition which restricted the company to one only of the plans, and all that this court said upon the subject was that that complaint would come more properly from the railway company than from the property owners. No question as to the incorporation of the Elevated Railway Company was before the court, it being fully recognized as an existing corporation. The same remarks apply to the case of the *Gilbert Elevated Railway Company* (70 N. Y. 361). That company was organized as an elevated road before the Rapid Transit Act of 1875, under acts passed in 1872, 1873 and 1874, and was an existing corporation at the time of the passage of the Rapid Transit Act. The proceeding which came before this court was had under section 36 of the Rapid Transit Act, which authorized any existing corporation which had not forfeited its charter, or failed to comply with its provisions, whose route or routes coincided with those determined upon by commissioners appointed under the Rapid Transit Act, to construct and operate its railway thereon upon fulfillment of the requirements of the Rapid Transit Act. The question mainly considered was the constitutionality of section 36, which was contested as violative of section 18 of article 3 of the Constitution.

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These cases were not overlooked, but we found nothing in them in conflict with the conclusions at which we were constrained to arrive in the present case.

Third. It is claimed that this court overlooked the authorities cited on the appellants' points, to the effect that a defect in articles of association or in the affidavits annexed thereto, is not fatal to the existence of a corporation or its faculty to acquire franchises, but that the State alone can interpose and take advantage of such defects.

This court did not deem it necessary to comment in its opinion upon those authorities for the simple reason that we did not deem them applicable to the case at bar. In order to sustain proceedings by which a body claims to be a corporation, and as such empowered to exercise the right of eminent domain, and under that right to take the property of a citizen, it is not sufficient that it be a corporation *de facto*. It must be a corporation *de jure*. Where it is sought to take the property of an individual under powers granted by an act of the legislature to a corporation to be formed in a particular manner therein directed, the constitutional protection of the rights of private property requires that the powers granted by the legislature be strictly pursued, and all the prescribed conditions be performed. Where the power is conferred upon a corporation, duly formed, it will not be defeated simply because the corporation has done or omitted some act which may be a *cause* of forfeiture of its rights and franchises, for it rests with the State to determine whether such forfeiture will be enforced. Judicial proceedings are necessary to enforce such a forfeiture and it may be waived. That was the point to which the opinion in the matter of the *Brooklyn, etc., Railroad Company* (72 N. Y. 245), cited by the appellant was directed. It was assumed that this distinction was well understood, and a considerable portion of the opinion of this court in the present case was devoted to showing that the omissions and defects in the organization of the company were failures to comply with the conditions precedent to the existence of the petitioner as a corporation,

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and the exercise by it of the right of eminent domain, instead of being mere causes of forfeiture of rights acquired.

The petitioner further contends on this motion, that this court has not pointed out any objection to the plans of so much of the petitioners railways as are surface roads, and therefore claims that the surface railways should be allowed, even if the others were disallowed.

But the learned counsel overlooks the fact that even if the plans of the surface roads were in compliance with the act, that would not authorize a reversal of the General Term decision, or authorize a confirmation of the report of the Supreme Court commissioners. Even assuming that the report of those commissioners was not an entirety, and that it should be held equivalent to a consent of property owners as to a part of the routes, and ineffectual as to the others, the objection of the want of the prescribed forfeiture clause, applies to all the routes, and precludes even a partial confirmation.

Our decision was reached after careful examination and deliberation, in view of the large interests involved. But, notwithstanding our strong inclination to sustain the rights claimed to have been acquired by the petitioner, if it could reasonably be done without disregarding the protection which the law had thrown around the public and private rights affected, we found some of the objections presented and insisted upon by the respondents insurmountable.

Our attention has not been called, on this motion, to any subject which we had overlooked nor to any consideration which should induce us to change our conclusions.

The motion for a reargument, or to amend the remittitur, should therefore be denied.

All concur.

Motion denied.

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JOSHUA A. M. VAN COTT, Appellant and Respondent v.
JOHN PRENTICE et al., as Executors, etc., Appellants and
Respondents.

104	45
112	99
104	45
131	837
104	45
140	191

P., by an instrument termed by him therein his deed of trust, and by letters of instruction referred to therein, transferred to plaintiff certain securities and funds, in trust, to invest and collect the income thereon during the life of P. to pay over the income to K., to be by him appropriated for the use of four beneficiaries named, and at the death of P. the principal to be disposed in accordance with instructions contained in a writing sealed up and delivered with the instrument, with directions that it should not be opened until such death. A full power of revocation was reserved, and it was provided, as a condition of the grant, that the beneficiaries should "have no legal or equitable right to the principal or income," that the trustee should hold, subject to the grantor's direction and control, until his death; it was also declared that if any attempt should be made to interfere with the execution of the trust, or to claim the securities contrary to the conditions of the instrument that the trust should at once cease and determine. In an action to recover possession of the securities which had come into the hands of defendants, the executors of the will of P., *held* that a valid trust was fully and completely constituted, and as the same was not revoked by the settlor during his life the trustee was entitled to the possession of the trust property, that it was immaterial that the grant was voluntary and without consideration; that the declaration that the beneficiaries should have no legal or equitable right was not intended as a denial of an equitable right to enforce the trust as against the trustee while the settlement remained unrevoked, but only as a denial of any right as against the settlor; also that the validity of the title of the trustee was not affected by the fact that he held subject to the control and direction of P.; that while the trust continued and existed only at the will of the settlor it was good and effectual until revoked.

By the sealed instructions it was provided that the income should, after the death of P., be devoted to the use of the four beneficiaries named, or the survivors or survivor in specified proportions the principal to be paid to them "or survivor or survivors" in the same proportions, when the youngest shall come of age. *Held*, that the survivorship referred to was that existing at the death of the settlor, and so that the absolute ownership was suspended only during the continuance of two lives at most, both of which were in being when the trust was created.

(*Hawley v James*, 16 Wend. 61, distinguished.)

It was claimed that the sealed paper was testamentary in its character, and so not legally executed. *Held*, untenable; that it was a component

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part of the declaration of trust and spoke from its date, and the property then became vested in the trustee; that the result was not affected by the ignorance of the trustee or the beneficiaries of the contents of the paper until the death of P., as it was not essential that the trustee should know the contents in advance of the time when they were to guide his action, and he having accepted the trust with full knowledge that he was to learn of the ultimate disposition of the trust fund only at that time, and the beneficiaries, when the terms of the trust were disclosed, having claimed its benefit, this was sufficient.

The action was brought against defendants, as executors of P., and the complaint sought to charge them only in that capacity. After the trial an order was granted amending the summons and complaint and directing the judgment awarded to be entered against the defendants, individually and *de bonis propriis*. *Held*, that the order was properly reversed by the General Term; that the amendment substituted a new and different cause of action, which the defendants as individuals had had no opportunity to defend.

(Argued October 20, 1886; decided January 18, 1887.)

APPEAL by defendants from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 9, 1885, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court; also appeal by plaintiff from so much of said order as reversed an order of Special Term permitting an amendment of the summons and complaint. (Reported below, 35 Hun, 317.)

This action was brought against defendants as executors of the will of John H. Prentice, deceased, to recover possession of certain securities which came to the hands of defendant, but to which plaintiff claimed title as trustee under certain instruments in writing executed by said Prentice, March 4, 1871.

These instruments were delivered to the plaintiff at or about their date. Two of them were executed under seal the other, referred to in one of the sealed instruments as "confidential written instructions," was not under seal. The sealed instruments were attached to the complaint, marked schedule A and B. Of the body of schedule A the following is a copy: "For good and sufficient consideration the said Prentice hereby grants and assigns to the said Joshua M. Van Cott the securi-

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ties enumerated in schedule A, hereto subjoined, upon the trusts hereinafter more fully set forth, to wit:

"*First.*—To collect and receive the sums due and to become due thereon for principal and interest, and to discharge the same respectively as paid.

"*Second.*—From time to time to invest and reinvest the sums received thereon for principal in good bonds and mortgages or in public securities, subject to my direction or approval.

"*Third.*—To pay over the interest from time to time received on such securities or investments and reinvestments to Clarence King of New Haven, in the State of Connecticut, or to such other person or persons as I shall from time to time direct—the said King having no title to or beneficial interest in said payments; and the said King shall pay over said interest as received to the person, and for the uses specified in confidential written instructions bearing even date herewith, signed in duplicate, and to be delivered to the said Van Cott and the said King. And it is hereby declared and made a condition of these trusts that the beneficiaries thereof have no legal or equitable right to the principal or income of said securities or investments, but receive the same only as herein provided as proceeding solely from the bounty of said Prentice, and subject to his power to revoke the trusts hereby created.

"*Fifth.*—The said Joshua M. Van Cott shall hold the principal sums represented by the said securities and investments and reinvestments subject to the directions of the said Prentice contained in a private and confidential paper bearing even date herewith, delivered to him in a sealed envelope, to be opened by him at my death, if he shall survive me; subject, in the meanwhile, to my direction and pleasure, and to be returned to me in the event of my surviving him; and absolutely subject to my direction and control until the event of my death.

"*Sixth.*—In the event that the said Clarence King, or that the said beneficiaries, or that any person or persons whatever,

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shall by any suit or proceeding at law or in equity interfere with the execution of the trusts herein declared, or make any claim against the said Prentice or the said Van Cott to the said securities or investments or reinvestments or the income thereof, contrary to the provisions or conditions of the said trusts, then and thenceforth the said trusts shall cease, determine and become wholly void, and the said securities investments and reinvestments, with all the interest, income and increase thereof, shall thenceforth belong wholly to me, discharged of said trusts."

The "confidential written instructions," referred to in the third clause, were embodied in the unsealed instrument which directed said Clarence King to pay the interest received from plaintiff, as provided for in said clause, "to Mrs. Florence K. Howland (widow of the late George Howland) for the use of Mrs. Howland, to the extent of one-third part thereof, and of the three children of the said George Howland to the extent of the remaining two-thirds part thereof." A duplicate of these instructions was delivered to Mr. King at or about its date. Schedule B was the "private and confidential paper" referred to in the fifth clause. This was retained by plaintiff, as directed, and opened after the death of Mr. Prentice, which occurred in 1881. Of the material portion thereof the following is a copy: "And I now direct that unless I shall otherwise provide in my lifetime or by testamentary disposition, the said trustee shall, after my death, devote any further income from the said securities or the reinvestment thereof to the use of the said Mrs. Howland and three children—one-third to her and the residue equally to the said children or the survivors or survivor of them; and the principal of said securities, or the reinvestments thereof, shall be delivered to the said persons or survivor or survivors in the same proportions when the youngest of said surviving children shall come of age, unless in the exercise of his discretion he shall sooner make such distribution of said principal." The trust was in no manner revoked by the settlor during his life. Further facts appear in the opinion.

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Joshua M. Van Cott plaintiff in person. A trust is executed when it has the elements of a competent trustee, a defined trust estate, and a sufficient declaration of the objects and purposes of the trust, as in this case. It is executory only when some element of an executed trust needs to be supplied with the aid of a court of equity. (4 Kent's Com. 305, 336, 337; Hill on Trusts. 82, 83, 130, 133, 134; Perry on Trusts, § 359; Williams on Pers. Prop. 215; *Young v. Young*, 80 N. Y. 442; *Martin v. Funk*, 75 id. 134; *Boone v. Savings Bank*, 84 id. 83; 1 Lead. Cas. in Eq. 17, 28; *Stone v. Hackett*, 12 Gray, 227; *Davis v. Ney*, 125 Mass. 590; *Melroy v. Lord*, 4 De. G., F. & J. 274; *Adams v. Adams*, 12 Wall. 185; *Morse v. Morse*, 85 N. Y. 53, 59, 60; *Gilman v. McArdule*, 99 id. 451; *Mabie v. Bailey*, 95 id. 206; *Willis v. Smyth*, 91 id. 297; *In re Diez*, 50 id. 88, 93.) A power reserved to revoke, and a provision that the trust shall determine upon the happening of specified contingencies, do not affect the nature or validity of the trust while it continues. (1 R. S. 733, 735, §§ 86, 105, 108; *Belmont v. O'Brien*, 12 N. Y. 394, 404; *Rosenburg v. Rosenburg*, 40 Hun, 91.) As the power to revoke was never exercised, and neither contingency that might have *ipso facto* determined the trust ever happened, they may be eliminated, and regarded as if not provided for in the trust deed. (Perry on Trusts, § 104; *Barlow v. Loomis*, 19 Fed. R. 677.) The trust does not violate the statute against perpetuities. (1 R. S. 773, § 1; *Manice v. Manice*, 43 N. Y. 385; *Tiers v. Tiers*, 98 id. 568; *Benedict v. Webb*, id. 460; *Radley v. Kuhn*, 97 id. 26; *Van Schuyver v. Mulford*, 59 id. 426; *Kiah v. Grenier*, 56 id. 220; *Savage v. Burnham*, 17 id. 561; *Harrison v. Harrison*, 36 id. 543; *Woodgate v. Fleet*, 64 id. 566; *Provost v. Provost*, 70 id. 141; *Schelter v. Smith*, 41 id. 328; *Gordier v. Johnson*, L. R. Ch. Div. 441; *Adams v. Perry*, 43 N. Y. 487.) The interests taken by the donees at the settlor's death being vested and not liable to go over, were alienable. (*Haves v. Van Orden*, 84 N. Y. 270; *Tucker v. Bishop*, 16 id. 402, 406.) The judgment was properly *de bonis propriis*, as no

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ground was alleged or proved for a judgment *de bonis testatoris*. (*Ferrin v. Myrick*, 41 N. Y. 315; *Patterson v. Patterson*, 59 id. 574; *Smith v. Mack*, 15 The Rep. 74; *Taylor v. Davis*, 110 U. S. 330; *De Valengius v. Duffly*, 14 Peters, 282; *Austin v. Monroe*, 49 N. Y. 360, 366; *Schmittler v. Simon*, 101 id. 554.) The nature of the action is determined by the body and substance of the complaint. (*Comes v. Harris*, 1 N. Y. 223; *Austin v. Monro*, 47 id. 360; *Wetmore v. Porter*, 92 id. 82, 83; *Merritt v. Seaman*, 6 id. 168; *Beers v. Shannon*, 73 id. 297; *Brown v. Knapp*, 79 id. 137; *Addison on Torts*, 938, § 1318 [Last Am. ed.]) It was proper to regard the use of the word "as" in the title of the complaint as a clerical error, and to correct it by amendment. (Code, § 723; *Reeder v. Sayre*, 70 N. Y. 492; *Thomas v. Nelson*, 69 id. 118; *Harris v. Turnbridge*, 83 id. 92; *Railroad Co. v. Henry*, 17 Fed. Rep. 416; *Thompson v. Strauss*, 16 Week. Dig. 503.)

Aaron J. Vanderpoel for defendants. The title to the securities remained in the testator until the time of his death, and passed to defendants, as his executors, to be disposed of according to his will. (*Young v. Young*, 80 N. Y. 437; *Fry on Spec. Perf.* [3d ed.] § 92; *Warriner v. Rogers*, L. R. 16 Eq. Cas. 340; *Richards v. Delbridge*, L. R. 18 Eq. 11, 13; *Shurtliffe v. Francis*, 118 Mass. 154; *Hall v. Hall*, L. R. 14 Eq. Cas. 365.) Treated as a gift the transaction was incomplete and invalid. (*Young v. Young*, 80 N. Y. 422; *Little v. Willetts*, 37 How. Pr. 481, 493; *Meiggs v. Meiggs*, 15 Hun, 453, 458; *Fisher v. Hall*, 41 N. Y. 416; *Bryant v. Brant*, 42 id. 11; *Heartly v. Nicholson*, L. R. 19 Eq. 233.) To create a valid voluntary trust in a third person capable of enforcement, especially in favor of one not of kin, it is necessary that the settlor should have parted with all dominion and control over the subject of the trust and done everything essential to pass the title thereto to the trustee. (*Martin v. Funk*, 75 N. Y. 134; *Young v. Young*, 80 id. 422; *Jackson v. Twenty-third St. R. Co.*, 88 id. 520; *Meiggs v. Meiggs*, 15

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Hun, 453; *Harrison v. McMenomey*, 2 Edw. Ch. 251; *Bulbeck v. Silvester*, 48 L. J. [N. S.] Ch. 280; *Milroy v. Lord*, 31 L. J. Eq. 449; *Hughes v. Stubbs*, 1 Hare, 476; *West v. West*, 9 L. R. Ir. 121.) There is no substantial difference in principle between a gift and a voluntary trust. The latter is no less a gift than the former. The one is direct to the beneficiary, the other through the intervention of a trustee, and the principles applicable in the one case are equally applicable in the other. (*Young v. Young*, 80 N. Y. 422; *Martin v. Funk*, 75 id. 134; *Curry v. Powers*, 70 id. 212; *Trow v. Shannon*, 78 id. 446; *Doty v. Wilson*, 47 id. 580; 2 Schouler on Pers. Prop. 118; *Vass v. Hicks*, 3 Murphy [N. C.], 494; *Sutton v. Hallowell*, 2 Dev. 186; *Lance v. Lance*, 5 Jones L. R. 413; *Trow v. Shannon*, 78 N. Y. 446; *Acker v. Phœnix*, 4 Paige, 305; *West v. West*, 9 L. R. Ir. 121.) The disposition of the securities to take effect on the death of Mr. Prentice was of a testamentary character. (Perry on Trusts, 92, 93; *Vandenberg v. Palmer*, 4 Kay & J. 216; *Shurtliffe v. Frances*, 118 Mass. 154; *Frederick's Appeal*, 52 Penn. 388; *Hughes v. Stubbs*, 1 Hare Ch. R. 476.) The alleged trust contained in the secret papers was void under the statute. The absolute ownership of the property was suspended for a longer period than during the continuance, and until the termination of more than two lives in being at the date of the instrument. (1 R. S. 733, §§ 1, 2; *Livingston v. Gordon*, 84 N. Y. 136; *Hawley v. James*, 16 Wend. 60; *Levi v. Hall*, 54 Barb. 248, 260; *McSorley v. Leary*, 4 Sand. Ch. 414; *Knox v. Jones*, 47 N. Y. 389; *Colton v. Fox*, 67 id. 343; *Schettler v. Smith*, 41 id. 328.) The property in question having come into the hands of the defendants as executors and without any wrongful act on their part, a demand is necessary in order to maintain an action of replevin. (*Sylvester v. Williams*, 37 How. 109; *Talcott v. Belding*, 46 id. 419; *Honell v. Kroose*, 4 E. D. Smith, 357; 1 Wait's Pr. 124; *Wheeler v. Allen*, 51 N. Y. 37.) The words "as executors" characterize the action and are not words of description. (*Austin v. Monroe*, 47 N. Y. 360.)

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FINCH, J. The objection that the trust here sought to be enforced was voluntary and without consideration has no weight, if it was, in fact, fully and completely constituted. (*Young v. Young*, 80 N. Y. 422, 437 ; *Jones v. Lock*, L. R. 1 Ch. 25.) By what the grantor denominated his deed of trust he transferred to the trustee named and appointed in the instrument, the securities and funds now in question, directing the income, during his life, to be paid to Clarence King, to be by him appropriated to the use of Mrs. Howland and her three daughters in specified proportions, and at his death the principal to be disposed of in accordance with sealed instructions therewith delivered, but not to be opened till that event. A full power of revocation was reserved, and it was provided as a condition of the grant that the beneficiaries should have no legal or equitable right to the principal or income ; that the trustee should hold subject to the grantor's direction and control until the event of his death ; and that if any attempt should be made to interfere with the execution of the trust, or to claim the securities contrary to the conditions imposed, then the trust should at once cease and determine.

Neither the power of revocation nor the provisions determining the trust in the event of a legal interference, or the death of the trustee in the life of the settlor, are in the least inconsistent with the trust as completely and perfectly constituted. They both assume its separate and effective existence, and provide merely for its termination upon the happening of specified contingent events. But attention is called to the clauses in the deed which require the trustee to hold and manage the fund subject to the direction and control of the settlor, and deny to the beneficiaries any legal or equitable right to either principal or interest. The latter provision is plainly but an amplification of the idea involved in the power of revocation, for the grantor adds that the beneficiaries shall take what they receive as proceeding from his bounty and subject to his right to revoke at any moment. It is made by the statute an element of such a trust, when the subject is real estate, that the beneficiaries shall take no estate or interest

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in the lands, but may simply enforce the trust in equity. (1 R. S., 727, § 60.) The beneficiaries in the present trust must have such equitable right, but measured and limited by the lawful terms and conditions of the deed; and when, therefore, it was provided that they should "have no legal or equitable right to the principal or income" of the transferred securities, the clause unexplained might seem to some minds a denial of the equitable right to enforce the trust, and so inconsistent with its necessary and essential qualities as such. But that equitable right of enforcement is not in terms denied, and the language withholding a right in the fund is not stronger than that of the statute when it denies a right to the land and vests the whole legal and equitable estate in the trustee. We ought not to put the creator of this trust in the attitude of deliberately nullifying his own evident purpose. That he meant to create an effective trust is beyond all question, and a construction which makes him destroy in the very effort to create, should not prevail if there be any other rational interpretation. He gives us his own explanation. After saying what right the beneficiaries shall not have, he specifies what right they *shall* have in the phrase, "but receive the same only as herein provided as proceeding solely from the bounty of said Prentice, and subject to his power to revoke *the trusts hereby created.*" Since he intended to create an effective trust, and declared that he had done so, and delivered the possession and passed the title of the fund to the selected trustee, we are bound to understand his denial of an equitable right to the beneficiaries as meaning only to emphasize his own control flowing from the voluntary character of his act and his reserved power of revocation; as a supposed and actual result of his own right to end his bounty at any moment; and not as a denial of the right of the beneficiaries to enforce the trust, as against the trustee, while it should remain in existence, and the settlor, withholding his power of revocation, should permit it to stand. His meaning undoubtedly was, that as against himself and his own freedom of action, the beneficiaries should possess no

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legal or equitable right, and not that as against the trustee, while the settlement stood unrevoked, there should be no equitable recourse. I think that the phraseology in which the settlor forbids an interference with the trust confirms that construction. The language of the deed is: "In the event that the said Clarence King, or that the said beneficiaries, or that any person or persons whatever, shall, by any suit or proceeding at law or in equity, interfere with the *execution* of the trusts herein declared, or make any claim against the said Prentice or the said Van Cott to the said securities or investments or reinvestments or the income thereof *contrary* to the provisions or conditions of the said trusts, then" the trusts shall cease and determine. The motive of this provision, doubtless, was a fear that some creditor of Howland might attack the trust fund as being in truth a debt due him paid to his wife and children; and that fear explains the reiteration by the settlor of the idea that the fund came wholly from his bounty, and was purely voluntary. But what he guards against in the clause quoted is an outside interference preventing the *execution* of the trust, and a suit, legal or equitable, to enforce a claim *contrary* to its provisions, and this for the benefit and protection of the beneficiaries. A suit by them against the trustee to enforce the trust according to its terms, he does *not* forbid. I am therefore quite strongly of opinion that a just construction of the trust deed did not prevent its enforcement by the beneficiaries according to its terms.

What has just been said is also quite applicable to the other provisions which have been the subject of comment and which require that the trustees shall hold the fund subject to the direction and control of the settlor until his death. That language only repeats in another form the effect of the reserved power of revocation. The existence of that inevitably leaves in the settlor an absolute control, since at any moment he may end the trust and resume possession of the fund as his own. The trustee is directed to hold the fund and invest and reinvest and pay over as ordered, but is to do all this *subject* to the settlor's absolute control. This cannot mean that the trustee

is to have no title and the trust no effective existence, and the property remain the settlor's, but that the trust and the title, good and effectual while it stands, is, nevertheless, to continue and exist only at the will and pleasure of the settlor. Its continued existence was to be absolutely subject to the direction and control of Prentice, a result always inevitable where a power of revocation is reserved. We discover nothing in the provisions of the deed, properly construed, inconsistent with a completely constituted trust, wholly voluntary and benevolent, and subject to revocation by the settlor at any moment; a kind of trust of which the books furnish many instances, and which, indeed, are sometimes subject to doubt and suspicion if the power of revocation is absent.

But other questions argued grow out of the sealed and confidential paper to be opened only on the settlor's death, and which, when opened, disclosed the final disposition to be made of the trust fund. It is said, first, that the paper was testamentary in its character, and so not legally executed. The contention compels a view of the instruments delivered, which is unsound in several particulars. It assumes what is not true, that the title to the securities constituting the trust fund was never vested in the trustee, but the property was the settlor's at the moment of his death, and that the sealed paper alone, and by itself, is to be the subject of consideration, and took effect solely at the death of the signer. The three papers executed and delivered together, and at the same time, constituted the trust deed, and cannot be separated in determining their effect. The sealed paper was a component part of the declaration of trust, and spoke from that date. If it had been open and its contents disclosed, there would have been no doubt that a trust was created whose duration extended beyond the death of the settlor, and depended in part upon the contingency of that death; but the instrument would not thereby have become testamentary. The result is not changed by the ignorance of the trustee as to the contents of the paper. It was not necessary to his duty that he should know those contents in advance of the time when they were to guide his action.

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It is not at all uncommon that trustees are ignorant of the persons who are to be beneficiaries by reason of contingencies which only the future can develop. The trustee accepted this trust with full knowledge that he was to learn the contents of the sealed paper only at the settlor's death, and has steadily and continually performed the duties of the trust from the date of its creation in accordance with its terms. It is immaterial that the beneficiaries were ignorant of the trust for their benefit until disclosed at the death of Prentice. (*Cumberland v. Codrington*, 3 John Ch. 261; *Shepherd v. McIvers*, 4 id. 137.) It is sufficient that when disclosed they claim its benefit. The trustee knew when he took the sealed paper, because he was told, that it contained an ultimate disposition of the trust securities. His ignorance was confined to the character and objects of that disposition, and that only during a period when the knowledge was unnecessary. He *could* as he *did* accept the trust, and obedience to its terms was entirely possible, since he was permitted to know them all in ample time for his necessary action.

But when the paper was opened at the death of the settlor, the disposition made was found to be of a character to raise another question which has been quite earnestly debated. The appellant contends that the trust created was void because contrary to the statute against perpetuities. It first devotes at the settlor's death any further income accruing "to the use of Mrs. Howland and her three children, one-third to her and the residue equally to the said children or the survivors or survivor of them," and the principal is directed to be "delivered to the said persons or survivor or survivors in the same proportions when the youngest of said surviving children shall come of legal age, unless in the exercise of his discretion he (the trustee) shall sooner make such distribution of said principal." We are of opinion that the survivorship thus referred to is that existing at the date of the death of the settlor, and that the consequent duration of the trust is during the life of the settlor and the minority of the youngest of the three children living at his death, and so the absolute ownership is suspended only

during the continuance of those two lives at the most, both of which were in being when the trust was created. It is claimed that the language used is nearly identical with that passed upon in *Hawley v. James* (16 Wend. 61), but the difference is very marked and clear. There the suspension was not until the youngest of the grandchildren should attain the age of twenty-one years, but until the youngest of those who attained that age should reach it, and it was well suggested that the trust might continue during thirteen minorities by reason of deaths occurring before the prescribed age was attained. That vicious element is not present in the limitation before us. The deaths of any of the three children of Mrs. Howland during the life of the settlor, had such occurred, would have been immaterial, as his own and not theirs was one life measuring the duration of the trust, and at its termination the life or minority of the youngest of the three then living is the only other life bounding such duration. So far, therefore, as the defendants' appeal is concerned, we discover no error, and the judgment should be affirmed, with costs.

But the plaintiff also appeals from an order of the General Term reversing an order of the Special Term permitting an amendment of the summons and complaint. The action was brought against the defendants in their representative capacity as executors of Prentice. The summons and complaint were so entitled, the use of the word "as" indicating that intention. The complaint alleged that the defendants held the property in their representative capacity, which the latter admitted, and the issue presented by the pleadings was whether the executors had title or the trustee. The complaint conceded that the defendants asserted no other title or claim. After the trial a motion was made and granted amending the summons and complaint and ordering the judgment awarded to be entered against the defendants, individually and *de bonis propriis*. On appeal, the General Term reversed the order, and, we think, correctly. The amendment substituted a new and different cause of action, and the defendants as individuals had been furnished with no opportunity to defend.

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The order appealed from by the plaintiff should be affirmed with costs.

All concur, except RAPALLO and EARL, JJ., not voting.
Judgment and order affirmed.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD
COMPANY, Appellant.

At common law a carrier of passengers and freight is under no obligation to provide depots for passengers awaiting transportation or warehouses for freight.

No such obligation is imposed by the General Railroad Act of this State (chap. 140 Laws of 1850) or the various amendments thereof, upon railroad corporations organized under it.

The obligation may not be implied from the fact that such corporations are executing a public trust, and authorized by the act to "erect and maintain all necessary and convenient buildings, stations * * * for the accommodation and use of their passengers, freights and business." (§ 28, subd. 8.) The exercise of this power is in the discretion of the corporation, and with the exercise of that discretion the legislature alone can interfere.

It seems the legislature has power to impose such an obligation.

The railroad commission, organized under and in pursuance of the act of 1882 (chap. 353, Laws of 1882) has judicial power to hear and determine, upon notice, questions arising between the people and a railroad corporation, but no power is given to it, or to any court, to enforce the decision, and its proceedings and determinations amount to nothing more than an inquest for information. The attorney-general is given no new power in the matter, and the corporation may continue the management of its business in its own way, without regard to the judgment of the commissioners.

State v. N. H. & N. R. R. Co. (87 Conn. 153), distinguished.

While the courts may, by *mandamus*, act in certain cases affecting corporate matters, they can only do so where the duty concerned, and thus attempted to be enforced, is specific and plainly imposed upon the corporation.

People v. D. & C. R. R. Co. (58 N. Y. 152); *People ex rel. v. B. & A. R. R. Co.* (70 N. Y. 569); *People ex rel. v. R. & S. L. R. R. Co.* (76 N. Y., 294), distinguished.

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Accordingly, *held*, that the Supreme Court had no jurisdiction to grant a writ of *mandamus* on behalf of the people, at the instance of the attorney-general, requiring a railroad corporation to erect a building at a station on its road of sufficient capacity to accommodate the passengers and freight business at that place, although it appeared, and was conceded by the corporation, that its station building was entirely inadequate for these purposes, that the absence of a suitable depot building and warehouse was a serious injury to the public doing business at that station, and that upon a complaint made to the railroad commissioners, and, upon notice to the defendant, that body adjudged and recommended that the company should construct a suitable building within a time named, with which recommendation it refused to comply, not for want of means, but because its directors decided not to do so.

(Argued November 22, 1886 ; decided January 18, 1887.)

APPEAL from order of the General Term of the Supreme Court, in the fifth judicial department, made the first Tuesday of June, 1886, which affirmed an order of Special Term, granting a peremptory writ of *mandamus*, the substance of which as well as the material facts are stated in the opinion.

E. C. Sprague for appellant. A *mandamus* will not lie to compel the performance by a corporation of any specific act, where its performance is vested in the discretion of the directors of the corporation. (*Catterham R. v. London, etc. Co.*, 1 C. B., N. S., 87 E. C. L. R. 410, 417; *So. E. R. v. R. Co.*, 5 L. R., Q. B. D. 217, 234, 238; 6 id. 586; *Hall & Co. v. London, etc. R. Co.*, 157 id. 505, 537; *Conn. v. N. H. & N. H. R. R. Co.*, 37 Conn. 153; *McDonald v. Chicago, etc., R. R. Co.*, 26 Ia. 124; *Liscomb v. N. J. R. R. Co.*, 6 Lans. 75; *N. Y. & H. R. R. Co. v. Kip*, 46 N. Y. 546; *People v. N. Y. L. E. & W. R. R. Co.*, 28 Hun, 548; *People v. N. Y. L. E. & W. R. R. Co.*, 22 id. 533; *People v. L. I. R. R. Co.*, 31 id., 125.) That there does not exist such a complete and perfect legal right on the part of the people, and such a clear and legal obligation on the part of the defendant to construct a new station building at Hamburg as to justify the issuing of a *mandamus*, is

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maintainable under the following authorities: (1 *Redf. on R.* 633; 2 *id.* 249; *People v. Supervisors, etc.* 64 N. Y. 600; *Minn. v. Railway Co.*, 40 Minn. 40; *People v. Railway Co.*, 63 How. Pr. 291; High on Extr. Rem., §§ 315-322; *Peik v. Chicago R. R. Co.*, 4 Otto, 164, 178; *Louisville R. R. Co. v. R. R. Com.*, 19 Fed. R. 679, 698; Cooley on Const. Lim. 147.) The State having no direct interest in the subject matter of this proceeding, it could only be instituted at the relation of the parties interested, and should, therefore, be dismissed. (Code of Civ. Proc. §§ 1991, 1993, 1994.)

D. O'Brien, attorney-general, for respondent. A railroad company is a private corporation in the sense that the ownership of its property is private. But it is a public corporation in the sense that the user of its property is public. (*Olcott v. Supervisors, etc.*, 6 Wall. 678, 694, 695; *Bloodgood v. M. & H. R. R. Co.*, 18 Wend. 9; *Worcester v. R. R. Co.*, 4 Met. 566; *Talcott v. Pine Grove*, 1 Flippin, 19; *Messenger v. R. R. Co.*, 36 N. J. L. 407, 413.) The powers granted having been exercised by the company—the road constructed—the duty of maintaining the road for the benefit of the public is mandatory, and this court has the power to compel the company to maintain and operate its road in such manner as to carry out the object for which it was incorporated. (*Farmers' L. & T. Co. v. Henning, etc.*, 17 Am. L. Reg. [U. S. Ct.] 266, [ed. of 1878]; *Bloodgood v. M. & H. R. R. Co.*, 18 Wend. 21; *People v. N. Y. C. etc. R. R. Co.*, 28 Hun, 548, 550.) A railroad company can be compelled by *mandamus* to operate its entire road for the use of the public. (*People v. A. & R. R. Co.*, 24 N. Y. 261; Potter's Law of Corp.; *Hall v. London & B. Co.*, 15 Q. B. D. 505; Rorer on Railroads, 474; *In re N. Y. & H. R. R. Co. v. Kip*, 46 N. Y. 546, 552.) As common carriers, it is the duty of railroad companies to have a suitable place for the receipt of goods. (*Sherman v. H. R. R. R. Co.*, 64 N. Y. 254; *Fenner v. B. & S. L. R. Co.*, 44 *id.* 505; *Hedge v. H. R. R. Co.*, 49 *id.* 223; *Rogers v. L. I. R. R. Co.*, 1 T. & C.

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396; 56 N. Y. 620.) The railroad company is a creature of the legislature and is subject to the direction of the court, and *mandamus* has been recognized as the appropriate remedy to compel railroad companies to perform duties owing to the public. (*Trust Co. v. R. R. Co.*, 17 Am. L. Reg. [N. S.] 266; *People ex rel. Greene v. D. & C. R. R. Co.*, 58 N. Y. 152; *People v. R. R. Co.*, 70 id. 569; *State v. Gorham*, 37 Me. 45; *Cambridge v. R. R. Co.*, 7 Met. 70; *People v. R. R. Co.*, 14 Hun, 371; 76 N. Y. 294; *State v. R. R. Co.*, 9 Rich. [Ill.] 247; *R. R. Co. v. People*, 56 Ill. 365; *R., N. B. & C. R. R. Co.*, 1 P. & B. [New Bruns.] 667; *State v. R. R. Co.*, 29 Conn. 538; *R. R. Co. v. Hall*, 91 U. S. 343; *Hall v. U. P. R. R. Co.*, 3 Dill. 515; *U. S. v. U. P. R. R. Co.*, 4 id. 479; *State v. R. R. Co.*, 37 Conn. 154; *King v. R. R. Co.*, 2 Barn. & Ald. 646; *State v. Wilmington Bridge Co.*, 3 Harr. [Conn.] 312; *In re Trenton W. P. Co.*, 20 N. J. L. 659; *Reg. v. Bristol Dock Co.*, 2 Q. B. 64; *People v. Manh. Co.*, 45 Barb. 136; *City v. St. Louis Gas Co.*, 70 Mo. 69, 117; *Horiston v. Comm.*, 36 Tex. 382; *Riggs v. Johnson Co.*, 6 Wall. 166; *Mayor v. Lord*, 9 id. 409; *Norris v. Irish Land Co.*, 8 El. & B. 525; *People v. Troy R. R. Co.*, 37 How. Pr. 427; *People v. N. Y. C. R. R. Co.*, 28 Hun, 543; 30 id. 78; *People v. R. R. Co.*, 24 N. Y. 261, 267, 269; *R. R. Com. v. R. R. Co.*, 63 Me. 260; *McCoy v. R. R. Co.*, 13 Fed. R. 378; *Talcott v. Pine Grove*, 1 Flippin, 145; *R. R. Com. v. R. R. Co.*, 13 Fed. R. 3, 7, 8.) The writ of *mandamus* is a State writ and properly issued on the application of the attorney-general. (Code of Civ. Pro., §§ 1991, 1993, 2070; Tapping on Man. 54, 56, 288; Moses on Man. 194, 199; *People v. Collin*, 19 Wend. 64, 68; *U. P. R. R. Co. v. Hall*, 91 U. S. 355; *People v. E. R. Co.*, 28 Hun, 554; Laws of 1882, Chap. 353; *N. Y. R. R. Co.*, 74 N. Y. 302, 307; *Candee v. Howard*, 37 id. 653; Wood on Man. 56, 111, 114, 115; Addison on Torts, 1486.) The damage has been a continuing one. The usurpation of the corporate powers constitutes a continuing cause of action to the people. (*Kellogg v. Thompson*, 66 N. Y. 88; *People v. Ins. Co.*, 38

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Barb. 323; *Waldron v. Hawkins*, 10 Wend. 167; Green's Brice's *Ultra Vires* [7th ed.], 714.)

DANFORTH, J. Upon motion on notice by the attorney-general for a mandamus requiring the defendant to construct and maintain on the line of its road, at the village of Hamburg, a building of sufficient capacity to accommodate its passengers arriving at that place, or departing therefrom, or in waiting to depart, and such freight as is usually received at or shipped from that point, it appeared that the village of New Hamburg contains twelve hundred inhabitants and furnishes to the defendant at a station established by it, a large freight and passenger business; that its depot building is entirely inadequate for these purposes, and the absence of a depot building and warehouse sufficient for the accommodation of passengers and freight has been and continues to be a matter of serious damage to large numbers of persons doing business at that station. These facts were conceded by the defendant. It also appeared that upon complaint made to the railroad commissioners after notice to the defendant, that body adjudged and recommended that the railroad company should construct a suitable building at that station within a time named, but although informed of this determination, the defendant failed to comply or do anything towards complying with it, not for want of means or ability to do so, but because "its directors decided that the interests of the defendant required it to postpone, for the present, the erection or enlargement of the station house or depot at the village of Hamburg."

The Supreme Court at Special Term granted the motion, and, adopting the language of the railroad commissioners, ordered that the defendant "forthwith construct and maintain a suitable depot building, of sufficient size and capacity to accommodate passengers arriving and departing on said road at the village of Hamburg, as well as such passengers as may be in waiting on ordinary occasions to depart from the said village, on the line and by the way of said defendant's road, and of sufficient capacity to accommodate such quantities of

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freight as are usually received at said village, or that may be shipped therefrom, by the way of said New York, Lake Erie and Western Railroad." Upon appeal to the General Term the order, after very careful consideration, was affirmed. The railroad company appeals.

We agree with the court below that at common law the defendant, as a carrier, is under no obligation to provide warehouses for freight offered, or depots for passengers waiting transportation. But that court has found such duty to be imposed by statute. To this we are unable to assent. The question arises upon the construction of the General Railroad Act (Laws of 1850, chap. 140), and its amendments. Under that act many companies have been formed to construct, maintain and operate railroads in a manner so affecting persons and private property as to be utterly indefensible, except upon the theory formulated by the express words of the statute, that the roads, when constructed, should be "for public use in the conveyance of persons and property." To promote that purpose and for that purpose only, such company may take the property of a citizen without his consent (§§ 1, 18), interfere with his travel and transportation by changing the lines of highways as may be desirable, with a view to the more easy ascent or descent of their own road (§ 24), and even appropriate to its purposes the land of a town or county or the State (§ 25). All these and other like powers are justified upon the ground that, when exercised, they are the acts of the government performed indirectly through the medium of a corporate body. It follows, of course, that the legislature has control over it and may compel the exercise of its functions and direct the management of its business and use of the road as in their judgment will best subserve the public interest.

The court below does not find, nor does the respondent claim, that the legislature has at any time, in express and specific terms, imposed upon a railroad company the duty of erecting or maintaining a depot or warehouse. It is sought to be implied. The company is empowered to erect and

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maintain all necessary and convenient buildings, stations, etc., "for the accommodation and use of their passengers, freight and business" (id. § 28, subd. 8), and may acquire and hold real estate and other property for these purposes, "as may be necessary to accomplish the object of its incorporation." There are some other provisions in the same direction; none go further than those cited. But from these, and from the circumstance first referred to, that the company is exercising a public trust, and to that cause owes its existence and capacity to enjoy and profit by the franchise it has accepted, it is argued by the respondent that the right to construct a station, and its necessity, carries with it an obligation to do so in a proper manner. In regard to the facts there is no dispute. A plainer case could hardly be presented of a deliberate and intentional disregard of the public interest and the accommodation of the public.

The railroad commissioners have thought that it was essential for those purposes that a new and enlarged building for passengers and freight should be erected. That it is true, was a question for them to decide. The statute (Laws of 1882, chap. 353), created a commission of "competent persons," required from them an official constitutional oath, assigned to them an office for the transaction of business, provided a clerk to administer oaths to witnesses and a marshal to summon them, gave full power of investigation and supervision of all railroads and their condition with reference not only to the security, but accommodation of the public, and declared that whenever, in their judgment, it shall appear, among other things, that any addition to, or change of the stations or station-houses is necessary to promote the security, convenience or accommodation of the public, they shall give notice to the corporation of the improvements and changes which they deem to be proper, and if they are not made, they shall present the facts to the attorney-general for his consideration and action, and also to the legislature. All these things have been done. The commissioners have heard and decided. They can do no more. After so much prelimi-

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nary action by a body wisely organized to exercise useful and beneficial functions, it might well be thought unfortunate that some additional machinery had not been provided to carry into effect their decision. By creating, the statute recognizes the necessity for, such a tribunal to adjust conflicting interests and controversies between the people and the corporation. It has clothed it with judicial powers to hear and determine, upon notice, questions arising between these parties, but there it stops. Its proceedings and determinations, however characterized, amount to nothing more than an inquest for information. We find no law by which a court can carry into effect the decision. At this point the law fails, not only by its incompleteness and omission to furnish a remedy, but by its express provision that no request or advice of the board, "nor any investigation or report made by" it, shall have the effect to impair the legal rights of any railroad corporation. The attorney-general is given no new power. He may consider the result of the investigation made by the commissioners, and their decision, and so may the company, but we must look further for his right of action, and the corporation, disregarding the judgment of the commissioners, may continue the management of its business in its own way, may determine, in its own discretion, to what extent and in what manner the exercise of a public trust requires it to subserve the "security, convenience and accommodation of the public."

It may say, as in this case, the accommodations we furnish are not sufficient, they are not suitable, the omission to furnish different and better entails injury upon the public, but we will give no better, nor make alterations until we choose. The railroad commissioners are powerless, and as the law now stands, neither the attorney-general of the State nor its courts can make their order effectual.

Cases are cited by the respondent in support of a different contention. Some of them turn upon statutory provisions, as do those arising in Connecticut, where the law makes the order of the commissioners effectual by authorizing its enforcement (*State v. N. H. & N. R. R. Co.*, 37 Conn. 153). Under

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our statute the public gain nothing in any legal sense from the determination of the commissioners. It is not enforceable as a judgment; it is not even a command; if it affects the railroad company at all, it is as advice merely. It can compel them only through the interposition of the legislature, who may indeed make it effectual by action upon their report, or by some general law, if it be deemed expedient, giving force and efficacy to their determinations.

In the next place, as the duty sought to be imposed upon the defendant is not a specific duty prescribed by statute either in terms or by reasonable construction, the court cannot, no matter how apparent the necessity, enforce its performance by mandamus. It cannot compel the erection of a station-house, nor the enlargement of one. The power of the company to provide such buildings is, under the statutes, a permissive one only. If the corporation choose to exercise it, it may. The statute does not exact it. It specifies certain things which the company shall not do. It specifies many things which it shall do, as, among others, "start and run its cars for the transportation of passengers and property, at regular times, to be fixed by public notice, and furnish sufficient accommodations for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting and at the junctions of other railroads, and at usual stopping places established for receiving and discharging way passengers and freight for that train, and shall take, transport and discharge such passengers and property at and from and to such places, on the due payment of fare or freight legally authorized therefor, and shall be liable to the party aggrieved, in an action for damages, for any neglect or refusal in the premises," and it must do some other specified things for their accommodation. The statute is peremptory as to many matters, but it nowhere says that for its intending passengers, or waiting freights, cover by building of any kind shall be provided. As to that the statute imports an authority only, not a command, to be availed of at the option of the

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company in the discretion of its directors, who are empowered by statute to manage "its affairs," among which must be classed the expenditure of money for station buildings or other structures for the promotion of the convenience of the public, having regard also to its own interest. With the exercise of that discretion the legislature only can interfere. No doubt, as the respondent urges, the court may by mandamus also act in certain cases affecting corporate matters, but only where the duty concerned is specific and plainly imposed upon the corporation. It was so in *People v. D. & C. R. R. Co.* (58 N. Y. 152), where the defendant was compelled to restore an invaded highway to its former usefulness—a statutory duty (Laws of 1850, chap. 140, § 28, subd. 5); so in *People ex rel. Kimball v. B. & A. R. R. Co.* (70 N. Y. 569), to build a bridge as directed by statute (Laws of 1874, chap. 648); in *People, etc., v. R. & S. L. R. R. Co.* (76 N. Y. 294), to erect fences as directed by statute (Laws of 1850, chap. 140). All these cases cited by the learned attorney-general, and there are many others, go upon the ground above stated.

Such is not the case before us. The grievance complained of is an obvious one, but the burden of removing it can be imposed upon the defendant only by legislation. The legislature created the corporation upon the theory that its functions should be exercised for the public benefit. It may add other regulations to those now binding it, but the court can interfere only to enforce a duty declared by law. The one presented in this case is not of that character. Nor can it by any fair or reasonable construction be implied. The whole subject of the relation between the company and its passengers and freightors appears to have been in contemplation of the legislature. Certain acts towards them as we have seen are made imperative as duties (§ 36); others, and among them the erection of stations and buildings, are made possible by permission (§ 28, subd. 8). We cannot disregard this difference in language, and give by implication to one phrase the same force and meaning which the legislature has by express terms

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conveyed in the other. We are constrained, therefore to hold that the appeal must succeed.

The order appealed from should be reversed and the motion denied, with costs.

All concur, RAPALLO, J., in result.

Ordered accordingly.

104	68
121	554
121	643

104	68
122	170

104	68
j 156	59

104	68
166	102

104	68
169	*284

104	68
75 AD	*571

FREDERICK S HEISER, Executor, etc., Appellant, v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

The board of assessors of the city of New York, in performing the duties imposed upon it by the act of 1872 (Chap. 729, Laws of 1872), in relation to the improvement of Eighth avenue in that city, did not act as the servants or officers of the municipal corporation, but as an independent tribunal, deriving its whole authority from the statute.

Prior to the passage of that act no liability existed, either at common law or by statute, on the part of the city to owners of real estate for injuries occasioned to them by changes of grade in the streets adjoining their premises.

The said act created no such liability, except in the mode and to the extent prescribed in the act, that is the liability is limited to a claim for the delivery of assessment bonds for the amount of any award made by said board.

In the case of public improvements, authorized by statute, which provides a mode of compensation to persons injured, that mode is exclusive and no right of action exists in their favor except that directed in the statute.

Accordingly *held*, that no right of action at law existed against the city to recover damages incidentally occasioned to land by changes in the grade in Eighth avenue.

Also *held*, that an equitable action was not maintainable to vacate an award and assessment made by said board, by reason of alleged fraud on the part of the assessors in making it, as the party aggrieved had a sufficient remedy at law.

(Argued November 17, 1886; decided January 18, 1887.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon

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an order made March 30, 1883, which affirmed a judgment in favor of defendant, entered upon an order dismissing plaintiff's complaint on the opening. (Reported below, 29 Hun, 446.)

The substance of the complaint and of the opening stated in the opinion.

Nathaniel C. Moak for appellant. Plaintiff is entitled, upon the facts set forth, to have the damages recoverable under the act of 1872 (Chap. 729) ascertained by the court without the aid of the board of assessors. (*Ewen v. Jones*, 2 Salk. 415; *People v. Hillsdale*, 2 Johns. 190; *Russell v. Mayor, etc.*, 2 Denio, 471; 11 Pet. 571; 4 Wend. 67; *Hobart*, 85; *People v. Purdy*, 4 Hill, 384.) The judgment of any, even of the highest, court may be attacked collaterally and set aside as between the parties thereto on the ground that it was fraudulently obtained. (*Clark v. Underwood*, 17 Barb. 202, 218-221; *O' Mahoney v. Belmont*, 62 N. Y. 145, 146; *Verplank v. Van Buren*, 76 id. 257, 258; *Dobson v. Pearce*, 12 id. 165, 168; *Davone v. Fanning*, 4 Johns. Ch. 199, 203, 204; *Mandeville v. Reynolds*, 68 N. Y. 529, 542-546; *Dolan v. Mayor, etc.*, 62 id. 472; *Mich. v. Phoenix Bank*, 33 id. 9; *Strusburgh v. Mayor, etc.*, 87 id. 456, 457; *In re N. Y., etc.*, 5 East. Rep. 800, 807; *In re Buffalo, etc.*, 32 Hun, 289; *Tingue v. Port Chester*, 101 N. Y. 294; *Delano v. Mayor, etc.*, 32 Hun, 144.) Where one is to have the compensation to which another is entitled ascertained by his own servant or officer, he is liable to a suit for the damages if he does not cause the award to be made within a reasonable time. (*Battersby v. Vise*, 2 Hurlst. & C. 42, 46; *Guidet v. Mayor, etc.*, 36 N. Y. Supr. Ct. R. 557; *Bowery Bank v. Mayor, etc.*, 63 N. Y. 336.) When a contractor is to be paid out of assessments to be levied by a city he may recover for his work and labor if the city unreasonably neglects to proceed to levy or to collect the assessments. (*Bowery Bank v. Mayor, etc.*, 8 Hun, 224, 228; *Sage v. Brooklyn*, 89 N. Y. 189; *Baldwin v. Oswego*, 2 Keyes, 136, 137; *Buck v. Lockport*, 6 Lans. 251.)

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David J. Dean for respondent. The Mayor, Aldermen and Commonalty of the city of New York is not liable in damages for the neglect, misconduct, or fraudulent act of the board of assessors. (Laws of 1859, chap. 302 § 15; Consolidation Act, § 865; Laws of 1872, chap. 729, p. 1226; *Wilson v. Mayor, etc.*, 1 Den. 595; *Mills v. City of Brooklyn*, 32 N. Y. 499; *Tone v. Mayor, etc.*, 70 id. 165; *Dillon on Mun. Corp.* [3d ed.] 978; *Maximillian v. Mayor, etc.*, 62 N. Y. 164; *Ham v. Mayor, etc.*, 70 id. 459.) If the plaintiff has been wronged by neglect or fraud on the part of these officials, he may have his action against them for his damages. (*Hover v. Barkhoof*, 44 N. Y. 124; *Fulton F. Ins. Co., v. Baldwin*, 37 id. 648; *Robinson v. Chamberlain*, 34 id. 389; *Adsit v. Brady*, 4 Hill, 630.) The defendant is not liable for the damages which the plaintiff's testator sustained by reason of the change of grade, unless that liability is prescribed by statutory provisions. (*Radcliff's Ex'rs, v. Mayor, etc.*, 4 N. Y. 195; *Story v. N. Y. El. R. Co.*, 90 id. 185; *Dillon on Mun. Corp.*, § 993; *Reock v. Newark*, 33 N. J. 129; *Calkin v. Baldwin*, 4 Wend. 667; *Dudley v. Mayhew*, 3 Comst. 9; *Russell v. Mayor, etc.*, 2 Den. 461; *Almy v. Harris*, 5 John. 175).

RUGER, Ch. J. At the trial the complaint was dismissed upon the opening, on the ground that no cause of action was stated.

The language of the opening is not set forth in the case, but is conceded to have been no broader than the complaint, and if no legal cause of action is stated therein, the action must fail.

The complaint alleges, substantially, that by chapter 729 of the Laws of 1872, the defendant became liable to persons owning lots on Eighth avenue, in the city of New York, upon which buildings were erected, for such damages as had been or might be occasioned to them by reason of change of grade in that street; that plaintiff's testator was the owner of such a lot on said avenue, which had been seriously

damaged by such changes, and that the board of assessors of the city of New York, with intent to injure and defraud the plaintiff, did on the 28th of March, 1876, illegally, covertly and fraudulently make and file in the finance department of the city of New York, a statement and award of the amount of damages, loss or injury sustained by Christina E. Smith, the plaintiff's testator, for damages to her said property, amounting to \$5,000, and "at or about the same time the board made and filed in the said finance department an assessment and certificate thereof against said property for benefit, by reason of the changes of grade of said avenue, in the sum of \$5,000;" that said assessors proceeded, without any notice, and in violation of a promise and agreement of said board with the plaintiff, to fix a time for hearing the proofs and arguments of the plaintiff; "that the said board of assessors, without due and proper or any actual notice to the plaintiff, proceeded to and did make the assessment and file the certificate required by said act;" that said assessments and certificate were so made and filed "unlawfully and fraudulently, and with the intent to deprive the plaintiff of the damages" inflicted upon her premises.

The relief prayed for was that the certificates of assessment for damages and for benefit might both be vacated, and that the plaintiff might recover damages against the defendant for \$150,000.

In dismissing the complaint the court below acted upon the assumption that the gravamen of the complaint was fraud, and the damages claimed were those suffered by the plaintiff from the illegal and fraudulent conduct of the board of assessors in making the award and assessment in the manner described, and held that the defendant was not responsible for such damages.

It was very properly held that the members of the board of assessors did not, in performing the duties enjoined upon it by the act of 1872, act as the servants or officers of the defendant, but constituted an independent tribunal deriving their whole authority from the statute and owing no duty to, and

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subject to no direction or control by the defendant. (*Mazmilian v. Mayor, etc.*, 62 N. Y. 160; *Tone v. Mayor, etc.*, 70 id. 157.)

Before the act of 1872 no liability, either at common law or by statute, existed on the part of the defendant to owners of real estate, for injuries occasioned to them, by changes of grade in the streets adjoining their premises. (*Conklin v. N. Y., Ont. & West. R. R. Co.*, 102 N. Y. 107, 109; *Radcliff's Ex'rs v. Mayor, etc.*, 4 id. 195; *Wilson v. Mayor, etc.*, 1 Denio, 595; *Lynch v. Mayor, etc.*, 76 N. Y. 60.)

Neither did the act of 1872 purport to create any such liability except in the mode pointed out, and to the extent prescribed by such act.

An appraisal by the board of assessors was by the statute made a condition precedent to the recovery of any compensation on the part of the injured party; the amount thereof was required to be assessed upon the premises thereby benefited; the right to enforce payment was predicated upon such appraisal and was limited to a claim for the delivery of assessment bonds by the comptroller, for the amount of the award made. No provision was made for the payment of such damages by the city at large, or in any other manner.

The statute assumed to create a right where none existed before, and it defined not only the extent of the right, but also the method of its enforcement.

It is well settled in the case of public improvements authorized by statute, wherein a mode of compensation is provided for persons injured thereby, that such mode is exclusive, and no right of action exists in their favor except that directed in the statute. (*Dillon on Mun. Corp.*, § 993; *Calting v. Baldwin*, 4 Wend. 667; *Dudley v. Mayhew*, 3 N. Y. 9.) As was said by the court below, "the only means of redress afforded to the plaintiff, therefore, were those provided for by this act."

It follows, therefore, that no right of action existed against the defendant, either at common law or by statute, to recover by an action at law the damages incidentally occasioned to the

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land in question by changes of grade in Eighth avenue, and unless some other cause of action is discovered the judgment of the court below must be sustained.

It was insisted before us that such a cause was found in the claim made to vacate and annul the award and assessment of the board of assessors, by reason of the alleged fraud of the assessors in making it.

It cannot be questioned but that courts have power in proper cases in actions brought for that purpose, to investigate, set aside and vacate the judicial declarations of other tribunals when they have been obtained by fraud.

The rule as stated in *Dobson v. Pearce* (12 N. Y. 165) is, "that a Court of Chancery has power to grant relief against judgments when obtained by fraud. Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party *could not avail himself at law*, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an interference by a court of equity."

Assuming, for the purpose of the argument, that the complaint was framed upon this theory, we are still unable to see that a sufficient cause of action is stated therein.

It does not appear therefrom but that the plaintiff had an ample and sufficient remedy at law for the injuries complained of, and although it was necessary for him to set aside the award referred to, to avail himself of the remedy provided by statute, no reason is suggested why such relief was not obtainable in a direct proceeding to review the determination of the assessors. His failure to prosecute this remedy to a successful termination, furnishes no ground for the exercise of the jurisdiction of this court to entertain an independent action to set aside the award.

The allegations of the complaint, in respect to the alleged fraud, are quite indefinite and vague, and do not suggest the idea that they were drafted for the purpose of making them the gravamen of the action.

The only fraud suggested is that sought to be implied from

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the conduct of the board of assessors in proceeding to a hearing of the claim for damages without notice to, or affording the plaintiff an opportunity to be heard. Even assuming that this conduct was fraudulently intended, it constituted an irregularity merely which was open to review and correction upon *certiorari* and afforded no ground for an independent action to assail the award of a judicial tribunal.

It was said by JUDGE ANDREWS, in *Smith v. Nelson* (62 N. Y. 288) that the "jurisdiction in one court to vacate, in an independent proceeding, the judgment of another having power to render it, is in its nature so extraordinary as to demand a close adherence to principles and precedents in exercising it. Courts do not exercise it when there has been negligence on the part of the party seeking the relief. That a judgment is final and conclusive of the right or thing which is adjudicated by it, is the rule, and judgments and decrees of a competent court will not be annulled for a suspicion of fraud, or because the party complaining may in fact have been unjustly cast in judgment." (See, also, *Stilwell v. Carpenter*, 59 N. Y. 414.)

The statements in the complaint are manifestly insufficient to bring it within the rule regulating actions to set aside judicial determinations for fraud, and it is not sustainable upon such a theory.

The judgment should, therefore, be affirmed.

All concur.

Judgment affirmed.

In the Matter of the Final Accounting of MARY J. MORGAN,
Executrix of the Will of CHARLES MORGAN, deceased.

A gift by a father to a child entitled to share in the estate of the donor, will not be held to be an advancement within the meaning of the provision of the statute of descents (1 R. S., 754, § 23), in relation to advancements to a child of an intestate, where it expressly appears to have been the intention of the father that the gift should not be considered as an advancement.

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- A gift made by the intestate to his wife is not affected by said provision ; such a set-off is only allowed as against children.
- A party who has permitted the reception of improper evidence without properly objecting thereto, may not thereafter object to the same, and has not a legal right to have the same stricken out.
- An objection made before a question is put calling for the evidence objected to, where there has been no offer of evidence, is premature, and so not available.
- An exception to an erroneous ruling of a surrogate on the trial by him of an issue of fact is not a ground for reversal, where it does not appear that the exceptant was necessarily prejudiced thereby. (Code of Civ. Proc. § 2545.)

(Argued December 8, 1886 ; decided January 18, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 8, 1885, which affirmed a decree of the surrogate of the county of New York upon final settlement of the accounts of Mary J. Morgan, executrix, etc.

The material facts are stated in the opinion.

John E. Parsons and *Chas. W. Dayton* for the appellants. The effect of the provision in Mr. Morgan's will, that his property be "given, devised and bequeathed as provided by the laws of the State of New York in cases of intestacy," was to incorporate into the will the statute of distribution. (*Stuart v. Stuart*, L. R. 15 Ch. Div. 544 ; *McRae v. McRae*, 3 Bradf. 199, 206 ; R. L. of 1813, 313 ; Kent and 1 Rade. ed. Laws of N. Y., rev. 1801, 538 ; *Beebe v. Estabrook*, 79 N. Y. 246 ; *Walton v. Walton*, 14 Ves. 324 ; *Camp v. Camp*, 18 Hun, 217.) If by the terms of the will Mr. Morgan's estate is to be distributed as provided by the laws of the State of New York in cases of intestacy, the gifts are to be charged by way of advancement. (*Lawrence v. Lindsay*, 68 N. Y. 108, 111, 112 ; *Beebe v. Estabrook*, 79 id. 246, 251 ; *Sanford v. Sanford*, 61 Barb. 293, 299 ; *Dubois v. Ray*, 35 id. 162 ; *Langdon v. Astor's Ex'rs.*, 16 id. 9, 33 ; *Benjamin v. Dimmick*, 4 Redf. 7 ; *Parks v. Parks*, 19 Md. 323, 333 ; *Graves v. Spedden*, 46 id. 527, 533 ; *Ison v. Ison*, 5 Rich.

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[S. C. Eq.] 15; *Rickenbacker v. Zimmerman*, 10 S. C. 110; *Stevenson v. Masson*, 43 L. J. [N. S.] Ch. 134; *Leighton v. Leighton*, L. R. 18 Eq. 458, 467; 2 Black. Com. 140; *Osgood v. Breed's Heirs*, 17 Mass. 356; *Chase v. Ewing*, 51 Barb. 612; 24 Mass. 619; *Smith v. Smith*, 21 Ala. 761.) It is not the law that a gift to a child who does not need a portion or settlement in life, is not an advancement within the statute. (*Chase v. Ewing*, 51 Barb. 612; Burrill's Law Dict. "Advancement;" *Merrill v. Rhodes*, 37 Ala. 449; *Autrey v. Autrey*, id. 614; *Johnson v. Hoyle*, 3 Head. 56; *Grattan v. Grattan*, 18 Ill. 167; *Dillman v. Cox*, 23 Ind. 440; *Hollister v. Attmore*, 5 Jones [N. C.], Eq. 373; *Lawrence v. Lindsay*, 68 N. Y. 112; *Cecil v. Cecil*, 20 Md. 153; *Mitchell v. Mitchell*, 8 Ala. 414; *Holliday v. Wingfield*, 59 Ga. 206; *Camp v. Camp*, 18 Hun, 218; *Walker v. Quigg*, 6 Watts. [Penn.] 87; *Sampson v. Sampson*, 4 S. & R. [Penn.] 333; *Osgood v. Breed's heirs*, 17 Mass. 358; *Jackson v. Matsdorf*, 11 Johns. 91; *Parish Admr. v. Rhodes*, Wright [O.], 339; *Brown v. Burke*, 22 Ga. 574; 8 Iredell, 121; *Grattan v. Grattan*, 18 Ill. 167; *Lawrence v. Mitchell*, 3 Jones [N. C.], 190; *Scott v. Scott*, 1 Mass. 526; *Hatch v. Straight*, 3 Conn. 31; *Clark v. Warner*, 6 id. 355; 1 Madd. Ch. Pr. 507; 4 Kent, 418; *Brown v. Brown*, 16 Vt. 197; *Fellows v. Little*, 46 N. H. 27; *Sayles v. Baker*, 5 R. I. 457; *Law v. Smith*, 2 id. 252; *Weatherhead v. Field*, 26 Vt. 204; *Miller's Appeal*, 31 Penn. 337; *Bukely v. Noble*, 2 Pick. 340; *Christy's Appeal*, 1 Grant's Cas. [Penn.] 369; *Watkins v. Young*, 31 Gratt. 84; *Hepworth v. Hepworth*, 11 L. R. [Eq.] 10; *Frookes v. Pascoe*, 10 L. R. [Ch.] 343.) There never was that delivery of the stock, or anything equivalent to it, which the law makes essential to a gift. (*Powell v. Hellicar*, 26 Beav. 261; *Hunter v. Hunter*, 19 Barb. 631; *Antrobus v. Smith*, 19 Ves. 39; *Trimmer v. Danby*, 25 L. J. Ch. 424; *Lambert v. Overton*, 13 W. R. 227; *Jones v. Lock*, L. R. 1 Ch. Ap. 25; *Moore v. Moore*, L. R. 18 Eq. 474; *Sharp v. Paton*, 10 C. of S. Cas. 1000; *West v. West*, 9 L. R. Ir. 121; *Austin v. Mead*, L. R. 15 Ch. D. 651; *Irons v. Smallpiece*, 2 Barn. & Ald.

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551; *Noble v. Smith*, 2 Johns. 26; *Young v. Young*, 80 N. Y. 422; *Tate v. Hibbard*, 2 Ves. Jr. 111; *Hewitt v. Kaye*, L. R. [6 Eq.] 198; *Beak v. Beak*, L. R. [13 Eq.] 489; *Davis v. Lane*, 10 N. H. 156; *Drew v. Munn*, L. R. 4 Q. B. D. 661; *Marwick v. Hardingham*, L. R. 15 Ch. Div. 339; *Smout v. Ilbery*, 10 M. & W. 1; *Hunt v. Rousmainer*, 8 Wheat. 201; *Angell & Ames on Corp.* § 560; *Edwards v. Hall*, 5 De. G. M. & G. 74; *Denton v. Livingston*, 9 Johns. 96.)

Charles A. Davison and *S. B. Brownell* for appellants. In order to constitute a gift *inter vivos* the donor must renounce and the donee acquire all interest in the subject of the gift. (*Hunter v. Hunter*, 19 Barb. 631; *Antrobus v. Smith*, 19 Ves. 39; *Trimmer v. Danby*, 25 L. J. 424; *Taylor v. Henry*, 48 Md. 550; *Pope v. Savings Bk.*, 56 Vt. Rep. 284; *Jones v. Locke*, L. R., 1 Ch. App. 25; *Young v. Young*, 80 N. Y. 422; Part 2, Cow. and Hill's notes [3d ed.] 826, 831.) If the transfers to Frances E. Quintard, Maria Louise Whitney and Richard J. Morgan were in fact completed gifts, they were *advancements*, and as such to be charged against and deducted from their several and respective legacies. (2 R. S. [Edmond's ed.] 299, 101, §§ 75-79; *Beebe v. Esterbrook*, 11 Hun, 523; 1 Wait's Act. and Def., 205; *Bouvier's Law Dict.*; *Burrill's Law Dict.*) The presumption that the gifts were advancements is greatly increased in the present instance by the magnitude of the gifts. (*Sanford v. Sanford*, 5 Lans. 491; *Taylor v. Taylor*, Eng. L. R. 20 Eq. Cases, 125.) If the gifts in question were not complete until after the execution of the will, then they are to be deemed as an ademption *pro tanto* of the legacies under the will. (Story Eq. Jur. §§ 1111, 1112; 1 Roper on Leg. 374; *Hine v. Hine*, 39 Barb. 507; *Benjamin v. Dimmick*, 4 Redf. 7; *Langdon v. Astor*, 16 N. Y. 34.)

Joseph H. Choate and *Francis Lynde Stetson* for Mrs. Whitney, Mrs. Quintard and S. G. Bogart, executor, respondents. The legal title to the shares in question was

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fully transferred to and vested in the respondents by the concurrent acts of Mr. Morgan, of Mr. Whitney, personally and as president, and of the other officers of the corporation, on the 14th and 15th of April, 1878. (*Carpenter v. Soule*, 88 N. Y. 251; *Cutting v. Damerel*, id. 411; *Jackson v. R. R. Co.*, id. 526; *Willis v. Smyth*, 91 id. 297; *Brisbane v. R. R. Co.*, 94 id. 205; *Mabie v. Bailey*, 95 id. 206; *Armitage v. Mace*, 96 id. 538; *In re Smithers*, 30 Hun, 635; *Stone v. Hackett*, 12 Gray, 227; *Gilman v. McArdle*, 99 N. Y. 451, 457; *Lowell on Transfer of Stock*, §§ 8, 9, 12, 44, 109; 3 *Lindley on Part.*, chap. 5, § 1; *Humble v. Mitchell*, 11 Ad. & E. 205; *Fisher v. Essex Bk.*, 5 Gray, 373, 378; *Gillette v. Fairchild*, 4 Denio, 80; *Anderson v. Nicholas*, 28 N. Y. 600; *Agricultural Bk. v. Burr*, 24 Me. 256; *Thorp v. Woodhull*, 1 Sandf. Ch. 411; *Rutter v. Kilpatrick*, 63 N. Y. 604; *Johnson v. A. & S. R. R. Co.*, 40 How. Pr. 193; *Wheeler v. Allen*, 49 Barb. 461; *First Nat. Bk. of Davenport v. Gifford*, 47 Ia. 575, 586; *Brigham v. Mead*, 10 Allen, 245; *Field v. Pierce*, 102 Mass. 253, 261; *Comins v. Cole*, 117 id. 45-48; *Beckett v. Houston*, 32 Ind. 393; *Cecil Nat. Bk. v. Watsontown Bk.*, 105 U. S. 217; *Burrall v. Bushwick*, 75 N. Y. 211; *Robinson v. Bk. of New Berne*, 95 id. 637; *Sargent v. Ins Co.*, 8 Pick. 90; *White v. Salisbury*, 33 Mo. 150; *Boatman's Ins. Co. v. Able*, 48 id. 136; *N. Y. & N. H. R. R. Co. v. Schuyler*, 38 Barb. 534; 34 N. Y. 30, 81; *Chouteau Spring Co. v. Harris*, 20 Mo. 382, 390; *Ellis v. Essex Merrimac Bridge Proprietors*, 2 Pick. 243, 248; *Stebbins v. Phœnix Fire Ins. Co.*, 3 Paige, 350, 361; *Grymes v. Hone*, 49 N. Y. 17; *Walsh v. Sexton*, 55 Barb. 251; *Westerlo v. De Witt*, 36 N. Y. 340; *Reed v. Copeland*, 50 Conn. 472, 487-491; *Brooks v. Marbury*, 11 Wheat. 78; *Rogers' Works v. Kelley*, 88 N. Y. 234; 3 *Wait's Act. and Def.*, 491; 50 Conn. 491; *Roberts' Appeal*, 85 Pa. St. 84; *Church v. Gilman*, 15 Wend. 656; *Brown v. Austen*, 35 Barb. 341; *Fisher v. Hall*, 41 N. Y. 416, 422, 423; *Grover v. Grover*, 24 Pick. 261; *Sumpter v. Tucker*, 14 Ark. 185.) The surrogate and the General Term did not err

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in holding that the law of advancements was not applicable in the administration or distribution of the estate of Charles Morgan. (*Terry v. Dayton*, 31 Barb. 519, 522; *Holt v. Frederick*, 2 P. Will. 358; *McFall v. Sullivan*, 17 S. C. 504, 518; *Greene's Ex'r v. Speer*, 37 Ala. 532, 535; *Thompson v. Carmichael*, 3 Sandf. Ch. 120, 135; 4 Bacon's Abridg. [Am. ed., 1868] 99; *Wheeler v. Sheer*, Moseley, 302, 304; *Cowper v. Scott*, 3 P. and Will. 119, 125; 3 Redf. [3d ed.] 430, § 23; *Walton v. Walton*, 14 Ves. 318, 324; *Brewton v. Brewton*, 30 Ga. 416; *Cleaver v. Kirke*, 3 Metc. [Ky.] 270; *Brown v. Brown*, 2 Iredell Eq. [N. C.] 309; *Black v. Whitall*, 9 N. J. Eq. 572; *Newell's Case*, Browne [Pa.] 311; *Kreider v. Boyer*, 10 Watts [Pa.] 54; *Wilson v. Miller*, 1 P. & H. [Va.] 353; *Coom v. Herring*, 4 Hawks, 393; *Hays v. Hibbard*, 3 Redf. 29; *Camp v. Camp*, 18 Hun, 217; *Clark v. Kingsley*, 37 id. 246.) When Mr. Morgan used the words "my property," in his will, his clear purpose was to dispose, not of what he had not, but of what he then had. (*Wheeler v. Sheer*, Moseley, 302, 304; *Camp v. Camp*, 18 Hun, 217; *Black v. Whitall*, 9 N. J. Eq. 572, 586.) When a will directs that the whole of the property of a testator "be disposed of as the law directs," it is to be deemed a disposition of the estate, and advancements will not be required to be brought into hotchpot as in case of intestacy. (*Walton v. Walton*, 14 Ves. 324; *Brewton v. Brewton*, 30 Ga. 416; *Kreider v. Boyer*, 10 Watts, 54; *Cleaver v. Kirke*, 3 Metc. [Ky.] 270; *Brown v. Brown*, 2 Iredell [N. C.] Eq. 309; *Newell's Case*, Browne [Pa.] 311; *Croom v. Herring*, 4 Hawks, 393; *Hays v. Hibbard*, 3 Redf. 29; *Camp v. Camp*, 18 Hun, 219; *Clark v. Kingsley*, 37 id. 246; *Black v. Whitall*, 9 N. J. Eq. [1 Stock.] 572; *Wilson v. Miller*, 1 P. & H. [Va.] 353.) It was not error for the courts below to hold that even if the statute concerning advancements were operative under the terms of the will, still it would not apply in respect of these shares of stock in question, which were not "advanced by the deceased by settlement or portion." (*Weatherhead v. Field*, 26 Vt. 665, 668; *Clark v.*

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Wilson, 27 Md. 693-700; *Morris v. Morris*, 9 Heisk. [Tenn.], 814, 817, 818; *Mitchell v. Mitchell*, 8 Ala. 421; *Merrill v. Rhodes*, 37 id. 449; *Woolery v. Woolery*, 29 Ind. 251; *Dillman v. Cox*, 23 id. 440; *Barber v. Taylor*, 9 Dana, 85; *Nelson v. Bush*, id. 105; *Parks v. Parks*, 19 Md. 323; *Cecil v. Cecil*, 20 id. 153; *Graves v. Spedden*, 46 id. 527; *Callender v. McCreary*, 5 Miss. 361; *Marsh v. Gilbert*, 2 Redf. 465; *Fennell v. Henry*, 70 Ala. 484; S. C., 45 Am. Rep. 88; *King's Estate*, 6 Whart. 370; *Lee v. Boak*, 11 Grattan, 182; *Taylor v. Taylor*, 20 Eq. Cas. 155; *Alexander v. Alexander*, 1 N. Y. 508-510.) The same arguments, which prove that the gifts to the issue were not advancements, prove that the gifts to Mrs. Morgan, Mr. Whitney and Mr. Quintard are free from impeachment, and that, as executrix Mrs. Morgan is not chargeable, for purposes of distribution, with the 7,500 shares given to her, nor with the value of the 24,500 shares given to the other donees. (*Black v. Whitall*, 9 N. J. Eq. 572.) The surrogate had no jurisdiction to give relief, on the ground, independently of all others, that the transfers were procured by fraud, circumvention or undue influence. (*Richardson v. Root*, 19 Hun, 473; *Stilwell v. Carpenter*, 59 N. Y. 425; *Boughton v. Flint*, 74 id. 481; *McNulty v. Hurd*, 72 id. 519; *Wright v. Fleming*, 76 id. 517; *Norris v. Norris*, 32 Hun, 175; *Post v. Mason*, 91 N. Y. 551.)

Algernon S. Sullivan for estate of Mary J. Morgan, deceased, respondent. There was a valid gift, *inter vivos*, of 7,500 shares of stock to Mrs. Morgan. It did not vest in agreement, but was completely executed. (2 Kent's Com. [13th ed.] 438; *Bedell v. Carll*, 33 N.Y. 383; *Gray v. Barton*, 55 id. 72; *Westerloo v. De Witt*, 36 id. 340; *Contant v. Schuyler*, 1 Paige Ch. 316; Lowell on Trans. of Stock; *Grymes v. Hone*, 49 N. Y. 17; *Van Heusen v. Rowley*, 8 id. 358; *Carpenter v. Soule*, 88 id. 252; *Fowler v. Lockwood*, 3 Redf. 467.) The title to the shares of stock mentioned in the deed for her, was vested in Mrs. Morgan. It was not necessary that she should have received the certificates in

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order to constitute her the lawful owner of the shares, a change of ownership having been noted upon the books of the company by its duly authorized officers. (*Nat. Bk. v. Watson Town Bk.*, 105 U. S. 222; *Sargent v. Essex Marine R. Co.*, 9 Pick. 201; 16 Mass. 94; *Buffalo etc. R. R. Co. v. Dudley*, 14 N. Y. 347.) The gifts to the children and grandchildren are not to be deemed advancements under the statute. The doctrine of advancement applies only in cases of total or partial intestacy. (*Thompson v. Carmichael*, 3 Sandf. Ch. 120; 2 Kent's Com. [13th ed.] 422; *Kircudbright v. Lady Kircudbright*, 8 Ves. 51; *Meeker v. Meeker*, 16 Conn. 387; *Sherwood v. Smith*, 23 id. 521; *Jackson v. Matsdorf*, 11 John. 91; *Hine v. Hine*, 39 Barb. 507; *Proseus v. McIntyre*, 5 id. 424; *Kingsbury's Appeal*, 44 Pa. St. 460; *Grattan v. Grattan*, 18 Ill. 170.)

DANFORTH, J. On the 16th of April, 1878, Charles Morgan made a will in these words: "All my property, real and personal, is hereby devised and bequeathed as provided by the laws of the State of New York in cases of intestacy." He appointed his wife, Mary J. Morgan, executrix, and on the eighth of May died. Letters testamentary were duly issued, and in February, 1880, the executrix applied to the surrogate for a judicial settlement of her account. Among other things (not material upon any question before us) she charged herself with 17,940 shares of the capital stock of "Morgan's Louisiana and Texas Railroad and Steamship Company." Objections were filed, in behalf of several grandchildren and great-grandchildren, to the effect that she should have charged herself with and accounted for 32,000 other shares of that stock. The testator, besides his widow and these objectors, also left surviving two married daughters, Mrs. Frances E. Quintard and Mrs. Maria L. Whitney, and a grandson, Richard J. Morgan, and anticipating a claim that these shares had been transferred by the testator before the execution of his will, the contestants also objected that there never was complete delivery of the shares, but if there were,

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then it was the result of undue influence; and if not, that the account was wrong because it fails to charge each of the above named persons and Mrs. Mary J. Morgan, the widow of the testator, with 7,500 shares of that stock, "as advancements to each of them by the decedent, within thirty days previous to his death."

By consent of all parties, the surrogate sent the account to a referee, with directions "that he proceed to take testimony as to the facts in relation thereto, to examine the account rendered, to hear and determine all disputed claims and other matters relating to said account, and to make report thereon with all convenient speed, subject to the confirmation of the surrogate."

The referee, after a protracted hearing of testimony offered by all the parties, made a report by which he found that none of the objections were well taken. Upon motion, the surrogate confirmed the report of the referee, and upon appeal to the General Term the decision of the surrogate was affirmed. In all these tribunals it was held that the transfers of the 32,000 shares were complete and effectual before the execution of the will, and that the principle of advancement was not applicable. It thus appears that the arguments of the appellants have failed to convince either one of three tribunals that the positions lying at the bottom of their contention were well founded, and after the most careful consideration we find no error in the determination of which they now complain. So far, indeed, as Mrs. Quintard and Mrs. Whitney are concerned, I do not understand that the learned counsel for the appellant makes any claim that the shares transferred to them are to go back to the estate or be taken account of in any way as against the executrix. So far as the shares claimed by Mrs. Morgan are concerned, they cannot be affected by any considerations growing out of the statute relating to advancements, for such a set-off is allowed only against children. (1 R. S., 754, § 23.) So far as the validity of the transfer of that portion, and the residue of the 30,000 shares, depends upon a perfected delivery to the donees, the evidence warrants the conclusion

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that nothing was left undone which was necessary to be done to deprive Mr. Morgan of the title thereto.

Upon the question of advancement the cases cited by the appellants are numerous, but upon the circumstances of the case ineffectual to change the result reached by the court below. They do not show, nor has any case been found to show that a gift to one entitled as a child to share in the estate of the donor, will be held to be an advancement when it expressly appears to have been the intention of the father that the gift should not be considered as such. The evidence goes to that length in this case and overcomes the presumption which might otherwise attach. It sustains the finding of the surrogate that "the transfers were not made by Charles Morgan as advancements or by way of settlement or portion in life, but were made for business reasons connected with or growing out of the operations and prospects of the said corporation, and with the intent on his part that by means of said transfers and other dispositions of property simultaneously made by him a controlling interest in the capital stock of the said corporation should be vested in his said transferees."

The acts of the testator and his declarations permit no other interpretation. If by his will it is apparent that he intended all his children to share in the distribution of his estate, his conduct and his words in parting, with portions of it before he made the will, show clearly that he did not intend they should share equally. Circumstances of his own creation leave no doubt as to his design and show that in his mind inequality was equity. It would, we think, defeat his purpose if the court should hold that the gift under the will should be impaired or lessened by his previous bounty.

I do not intend, however, to discuss this case at any length; it has been sufficiently examined and discussed by the courts below and it would be a useless repetition to do more than announce our conclusions.

In the first place we are of opinion that the evidence warrants the conclusions of the surrogate that the transfers of stock were complete, and that the legal title of the shares

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passed to the donees before the execution of the will. *Second.* That none of the stock thus transferred was intended by the donor to be advances by way of settlement or portion, but the contrary.

These propositions depended upon inferences from evidence which, if not all one way, was certainly not all together in favor of the appellants' view. On the part of the donor was the expression of an intention to make an actual delivery of written instruments declaring that intention, and sufficient to warrant the transfer of title upon the records of the corporation, and which proved to be legally available for that purpose. Every act essential to deprive the donor of his possession and title was performed, and the actual, as well as the apparent title, vested in the donees. The evidence allows this view: If, as the appellants claim, the testimony of the witness Margaret Dobson, or some expressions in that of others, permits in either respect a different conclusion, neither the referee, nor surrogate, nor General Term deemed it satisfactory or controlling. It follows that neither the shares of stock nor the value thereof were to be reckoned as part of the testator's estate, nor the donees, who were distributees also, to be charged therewith in estimating the amount of their respective shares under his will.

A single question remains. An exception was taken before the referee to evidence, but, so far as appears, not presented to the General Term. One L. was called by the proponent. It appeared at the outset of his examination that he was a lawyer, residing in New Orleans, holding there the relation of attorney and counsel to Mr. Morgan (the testator), and that at his request he came to New York, where he was consulted and employed by him, among other things, in relation to the stock in question, its certificates and transfer, and other affairs connected with it, his property and his plans and desires in regard to it.

The examination of the witness on these subjects continued to such length that in the printed record it covers nearly nine pages, with only a single objection interjected at

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a point where the witness was speaking of one of his interviews with Mr Morgan in regard to the law of this State relating to the distribution of the property of an intestate. The witness had stated that on the second of April he made a brief statement to the testator in regard thereto, and subsequently on the day before he made his will, a very full statement. He was then asked, "What was that statement?" and the counsel for contestants objected "as immaterial and incompetent." It is obvious that this objection was too general and did not raise the question now presented. It was overruled, and the witness answered fully and continued in regard to the execution of the transfers the day before the will was executed, saying, "I did not at that time state to him anything about the law of New York as to wills." At this point the contestants' counsel objected to any testimony as to what passed between the witness and Mr. Morgan preliminary to the execution of the will, or anything about the subject of his property, as immaterial and incompetent.

The record states that counsel for the executrix claimed that the objection ought not to apply "to what has already come from the witness, and that such objection can only be properly applied to what is to come hereafter," and that thereupon contestants' counsel "makes the further objection that what passed between this witness and Mr. Morgan is privileged and protected by the relation of client and counsel." The objection was overruled, and the exception then taken is the one relied upon. It can have no force so far as the testimony which preceded it is concerned. To that extent the witness had gone without interruption and he must be deemed to have been thought competent and his evidence admissible by both parties. Moreover at the precise point where the objection was made, the witness was testifying in answer to the question, "Tell what he, Mr. Morgan, said." To that question no objection was interposed, and he had completed his answer and narration as to what occurred at the interview of which he was speaking. Then came the objection. If, as would seem, it had reference to testimony

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already given, it came too late. It is entirely clear that a party who has sat by during the reception of incompetent evidence without properly objecting thereto, and thus taken his chance of advantage to be derived, therefrom has not when he finds such evidence prejudicial, a legal right to require the same to be stricken out. But even if the referee or surrogate could, in their discretion, strike out any of the testimony, no request was made that either should do so. If the objection related to evidence which might follow, it was too general. There was no new question to the witness, nor any offer of evidence. As to what followed, therefore, the objection was premature. It was not repeated. But assuming it to be good as to all that followed in the answer of the witness before the next question was put, it becomes unimportant. So much might be stricken out without impairing the weight of the evidence, or in any way affecting the conclusion reached upon the merits by either court. In no aspect could the exception require a new trial. For the evidence admitted under it fails to create even a suspicion that the exceptant was necessarily prejudiced thereby. (Code, § 2545.)

The judgment should be affirmed, with costs to the respondents, to be paid by the appellants.

All concur.

Judgment affirmed.

EMORY A. CHASE et al., Appellants, v. WILLIAM BELDEN,
Respondent.

The character of an American vessel is to be determined by reference to the United States statute upon the subject and the ship's papers.

In an action against the owner of the steam yacht "Yosemite," to recover damages for alleged negligence in colliding with and sinking plaintiff's steamboat, it appeared that the "Yosemite" was described in her license as a yacht "used and employed exclusively as a pleasure vessel and designed as a model of naval architecture." By the United

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States statutes (§ 2, chap. 141, U. S. Laws of 1848) the secretary of the treasury was authorized to cause such yachts, if entitled to be enrolled as American vessels, to be licensed "to proceed from port to port of the United States without entering or clearing at the custom house," or exclusively as coasting vessels. By an amendment of said statute (§ 2, chap. 170, U. S. Laws of 1870; U. S. R. S., § 4314) the words "and by sea to foreign ports" were added. The "Yosemite" was, at the time of the injury complained of, enrolled at the port of New York. Her certificate of enrollment recited that it was given in conformity to the title of the United States Revised Statutes, which relates exclusively to coasting and fishing vessels. Her license was a coasting license, with the added privilege of going by sea to foreign ports. The "Yosemite," at the time of the injury complained of, was proceeding up the Hudson river under steam. She carried the lights prescribed for ocean-going steamers and steamers carrying sail (U. S. R. S. § 4233, rule 3), but did not carry the "central range of two white lights" prescribed for coasting vessels navigating inland waters (Rule 7). *Held*, that the "Yosemite" was, at the time of the accident, navigating under her license in the character of a coasting vessel; that she was in fault in not carrying the lights prescribed for such vessels, and that the trial court erred in nonsuiting plaintiff.

It seems, if the collision had happened upon the high seas, another question would have been presented.

(Argued November 29, 1886; decided January 18, 1887.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made September 10, 1885, which affirmed a judgment in favor of defendant, entered upon an order nonsuiting plaintiffs on trial.

This action was originally brought by William Donahue, the testator of the present plaintiffs, to recover the value of the steamboat "Charlotte Vanderbilt," from William Belden, the respondent, owner of the steam yacht "Yosemite," for the running down of the "Vanderbilt" by the "Yosemite," near Esopus Meadow light-house, on the Hudson river, at between nine and ten o'clock in the evening of July 14, 1882.

The value of the "Vanderbilt" was admitted to be \$16,000, and that she was a total loss. The "Vanderbilt" was a freight and passenger steamboat, running between Albany and New

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York, on the Hudson River, and at the time of the collision was on her way to the city of New York. The "Yosemite" was an iron, steam, pleasure yacht of 481 tons burden, with two masts and having sails, which were furled at the time of the collision. When the collision happened she was under steam, on a trip from New York to Catskill, and proceeding at the rate of about sixteen miles an hour. She carried the usual red and green lights and at her foremast a white light, corresponding in character and position with the lights prescribed for ocean-going steamers and steamers carrying sail by section 4233, rule 3 of the Revised Statutes of the United States. She was enrolled in conformity with title 50, entitled "Regulation of Vessels in Domestic Commerce" of the Revised Statutes of the United States, and was licensed in pursuance of chapter 2, title 48 of the same statutes, "exclusively as a pleasure vessel and designed as a model of naval architecture," with leave "to proceed from port to port of the United States and by sea to foreign ports, without entering or clearing at the custom house, but not to be allowed to transport merchandise or any passengers for pay."

There was a great mass of evidence in respect to the circumstances of the collision, on the part of the plaintiffs, for the purpose of showing that the collision was caused by the negligence of the Yosemite, and especially from her failure to carry the proper lights, and on the part of the defendant to show that it was caused by the mismanagement and neglect of the "Vanderbilt."

The court, at the conclusion of the case, nonsuited the plaintiffs on the ground that no negligence had been shown on the part of the defendant, and especially that the principal ground of negligence on the part of the defendant, relied upon by the plaintiffs, viz., that the "Yosemite" did not carry the proper lights was not true, the court holding that she did carry, at the time, the lights required.

As the case turns upon the question of lights, it is only necessary, in addition to the foregoing facts, to state the rules as to lights upon steam vessels, prescribed by section 4233 of

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the Revised Statutes of the United States, so far as material here :

"Rule 1. Every steam vessel which is under sail, and not under steam, shall be considered a sail vessel ; and every steam vessel which is under steam, whether under sail or not, shall be considered a steam vessel.

"Rule 2. The lights mentioned in the following rules, and no others, shall be carried in all weathers between sunset and sunrise.

"Rule 3. All ocean-going steamers and steamers carrying sail shall, when under-way, carry :

"(a) At the foremast head a bright white light, of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, and so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side.

"(b) On the starboard side a green light, of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, and so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side.

"(c) On the port side a red light, of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, and so fixed as to throw the light from right ahead to two points abaft the beam on the port side.

"The green and red lights shall be fitted with inboard screens, projecting at least three feet forward from the lights, so as to prevent them from being seen across the bow.

"Rule 4. Steam vessels, when towing other vessels, shall carry two bright white mast-head lights vertically, in addition to their side lights, so as to distinguish them from other steam vessels. Each of these mast-head lights shall be of the

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same character and construction as the mast-head lights prescribed by rule 3.

"Rule 5. All steam vessels, other than ocean-going steamers and steamers carrying sail, shall, when under way, carry on the starboard and port sides lights of the same character and construction, and in the same position, as are prescribed for side lights by rule 3, except in the case provided in rule 6.

"Rule 6. River steamers, navigating waters flowing into the gulf of Mexico, and their tributaries, shall carry the following lights, namely: One red light on the outboard side of the port smoke-pipe, and one green light on the outboard side of the starboard smoke-pipe. Such lights shall show both forward and abeam on their respective sides.

"Rule 7. All coasting steam vessels, and steam vessels other than ferry-boats and vessels otherwise expressly provided for, navigating the bays, lakes, rivers or other inland waters of the United States, except those mentioned in rule 6, shall carry the red and green lights, as prescribed for ocean-going steamers; and, in addition thereto, a central range of two white lights; the after-light being carried at an elevation of at least fifteen feet above the light at the head of the vessel. The head-light shall be so constructed as to show a good light through twenty points of the compass, namely, from right ahead to two points abaft the beam on either side of the vessel; and the after light so as to show all around the horizon. The lights for ferry boats shall be regulated by such rules as the board of supervising inspectors of steam vessels shall prescribe."

P. Cantine for appellants. The want of proper lights, lookout, licensed pilot, or any of the things required by law, may be repelled and the question of facts submitted to the jury, whether the collision was the result of other causes for which the parties were negligent. It raises a presumption of negligence which can be overcome. (*Blanchard v. N. J. Steamboat Co.*, 59 N. Y. 292; *Cooper v. East. Trans. Co.*, 75 id. 116; 68 id. 392, 395; *Lambert v. S. I. R. R. Co.*, 70 id. 109; *The Atlas*, 4 Benedict, 27; 2 Moore's Priv. C. R. [N. S.];

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The Constitution, 453; *The Roona & Ava*, 2 Asp. Mar. L. Cas. 182; *The Cayuga*, 14 Wall. 270; *The Sunnyside*, 1 Otto, 208; *Allan v. Flora*, Holt, 114; *The Jane Bacon*, 27 W. R. 35; *The Legatees and the Emily*, Holt, 217; *Handayside v. Wilson*, 3 Car. & P. 528; *The Ida v. The Wasa*, 2 Mar. L. Cas. [O. S.] 414.) The yacht should not only have slowed but should have reversed or backed in time to avoid the collision. (*The Beryl*, L. R. 9 P. D. 137; *The Khedive*, L. R. 5 App. Cas. 876; *The Berkenhead*, 3 W. Rob. 75; *The James Watt*, 2 id. 270; *The Vivid*, 7 Notes of Cas. 127.) When signals are to be given, or any precautions taken, it must be done in time to enable the parties to act and accomplish the results required. If not given in time, the party is not relieved even by giving the proper signal or doing the proper act. (*The Beryl*, L. R. 9 P. D. 137, 140; *The Milwaukee*, Brown Adm. 313; *The Khedive*, 5 App. Cas. 876, 905; *The Wenona*, 19 Wall. 41, 52; *The Dexter*, 23 id. 69; *The Benares*, L. R., P. D. 16.) It was a question for the jury to determine if the speed of the yacht was not excessive under the circumstances. (*Rogers v. Steamer St. Charles*, 19 How. [U. S.] 108; Law of Coll. at Sea, Marsd. [2d ed.] 351, 358.) When approaching danger both vessels should stop. (*The Grand Republic*, 16 Fed. R. 425; *The City of N. Y.*, 15 id. 624; *Studdwell v. E. H. Coffin*, 8 Rep. 297; *The Johnson*, 9 Wall. 146.) Each vessel is bound to use all reasonable skill to avoid collision without regard to the previous fault of the other vessel. (*The Warren*, 18 Fed. R. 559.) The State statute and custom on the Hudson river required the yacht to carry the central range light. The State court will enforce it even if the Federal courts would not. (*The New York v. The Sarah Johanna*, 18 How. [U. S.] 223; *The Tyenword Swab* Adm., 374.) Where there was no lookout, it was a question for the jury to determine if the absence of a lookout was the cause of the collision. (*Blanchard v. N. J. Steamboat Co.*, 59 N. Y. 292, 295, 296; *The Annie Lindsley*, 104 U. S. 185; *The Dexter*, 23 Wall. 69; *The Fannie*, 11 id. 238; *The America*, 2 Otto [U. S.], 436.)

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Luther R. Marsh and *William G. Wilson* for respondent. The management of the "Vanderbilt" was in violation of the "Sailing and Steering Rules." (U. S. R. S. tit. 48, p. 823, § 4233; id. 858, §§ 4405, 4412; Gray on Reg. for Prev. Coll. at Sea, 3.) The "Vanderbilt" was chargeable with negligence, on the uncontradicted proof, in that she had no lookout at the time of the collision, in the proper sense of the word. (*The Ant.* 10 Fed. R. 294, 297; *St. John v. Paine*, 10 How. 558; *Newton v. Stebbins*, id. 607; *The Genesee Chief*, 12 id. 462; *The Catherine*, 17 How. 177; *Chamberlain v. Ward*, 21 id. 548; *Haney v. Steam Packet Co.*, 23 id. 293; *The Ottawa*, 3 Wall, 268.)

ANDREWS, J. The plaintiffs were nonsuited on the ground that the "Yosemite" at the time of the collision, carried the proper lights, and that no other negligence was imputable to her. This ruling was affirmed by the General Term.

The right of the defendant to maintain this judgment must, we think, turn upon the correctness of the ruling that the "Yosemite" was free from negligence. The counsel for the defendant while strenuously maintaining that the "Yosemite" had the proper lights, also insists that if the court below erred in this respect, nevertheless, the nonsuit should be affirmed on the ground that the collision did not result from this omission of duty, but was solely attributable to the mismanagement of the "Vanderbilt." The question whether there was any negligence on the part of the "Vanderbilt," which would bar a recovery, was not considered or decided on the trial. The nonsuit was put exclusively upon the absence of negligence on the part of the "Yosemite," and was affirmed on that ground by the General Term. If the ruling on the question of lights was erroneous, the case should, we think, be sent back for a new trial, on which the question as to the negligence of the "Vanderbilt" can be presented and considered.

The question whether the "Yosemite" at the time of the collision carried the proper lights, depends upon the construc-

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tion of the rules for preventing collisions on water, prescribed in Tit. 48, Chap. 5 of the Revised Statutes of the United States, as applied to the "Yosemite" while navigating the Hudson river. The rules prescribing the lights to be carried by steam vessels, divide such vessels into three classes, *first*, "ocean-going steamers, and steamers carrying sail," embraced in rule three; *second*, "river steamers navigating waters flowing into the Gulf of Mexico, and their tributaries," embraced in rule six; and *third*, "all coasting steam vessels and steam vessels other than ferry boats and vessels otherwise expressly provided for, navigating the bays, lakes, rivers, or other inland waters of the United States, except those mentioned in rule six," embraced in rule seven. In addition, rule four prescribes the lights to be carried by steam vessels when towing other vessels, which appears to be of general application. The "Yosemite" at the time of the collision had a green light on her starboard side, a red light on her port side, and at the foremast head a white light, being the lights prescribed for "ocean-going steamers and steamers carrying sail." It is insisted on the part of the defendant that the "Yosemite" was "an ocean-going steamer and a steamer carrying sail," and was bound to carry the lights prescribed in rule three, whether navigating the ocean or inland waters. The counsel for the plaintiffs, however, denies that the "Yosemite" was at the time of the collision, "an ocean-going steamer and a steamer carrying sail," within the meaning of rule three, and insists that the words "ocean-going steamer and a steamer carrying sail," are descriptive only of steamers while traversing the ocean and when on the high seas, and that every steamer, except those mentioned in rule six, while navigating inland waters, is bound to carry a "central range of two white lights," as prescribed in rule seven, whatever may be its general character as an ocean or inland vessel. We deem it unnecessary to decide this general question.

The "Yosemite" was, we think, in legal character and by proper nomenclature a "coasting steam vessel," and was, therefore, within the express terms of rule seven, bound to carry the

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central range lights prescribed in that rule. Even if this may not be absolutely true of the "Yosemite" in all situations, it was, nevertheless, true of her when navigating inland waters. If the "Yosemite" was a coasting vessel, it becomes quite unimportant to determine the true construction of the limiting clauses in rule seven. The rule in express words applies to "all coasting steam vessels," and plainly no vessels of that character are by the subsequent language excepted from the obligation to carry the central range lights. The legal character of a vessel is to be determined by reference to the statute and the ship's papers. The "Yosemite" was a yacht "used and employed exclusively as a pleasure vessel and designed as a model of naval architecture," and is so described in her license. By section 2, chapter 141, of the United States statutes of 1848, the secretary of the treasury was authorized to cause yachts "used and employed exclusively as pleasure vessels, and designed as models of naval architecture," if entitled to be enrolled as American vessels, to be licensed "to proceed from port to port of the United States without entering or clearing at the custom house." This statute was amended by section 2, chapter 170 of the United Statute of 1870, by inserting after the words "United States," the words "and by sea to foreign ports," and the original statute as amended by the act of 1870, now stands as section 4214 of the Revised Statutes. It will be observed that under the statute of 1848 yachts licensed thereunder were exclusively coasting vessels. By the amendment they might have a double character, viz., that of coasting vessels, and vessels entitled to go upon the seas to foreign ports. The "Yosemite" at the time of the collision, was enrolled at the port of New York, and her certificate of enrollment recites that it was given in conformity to title 50 of the United States Revised Statutes entitled "Regulations of Vessels in Domestic Commerce." She was also licensed, and her license recites that it was granted in pursuance of chapter 2, title 48, entitled "Regulations of Commerce and Navigation." By reference to title 50 of the United States

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Revised Statutes, under which the "Yosemite" was enrolled, it will be found that it relates exclusively to coasting and fishing vessels. The title next preceding, viz., title 49, is entitled "Regulations of Vessels in Foreign Commerce." It thus appears that the "Yosemite" was enrolled under the statute relating to coasting vessels, and her license was a coasting license, with the added privilege of going by sea to foreign ports. It does not seem to admit of reasonable doubt, having reference to the statute and to the enrollment and license, that the "Yosemite" while navigating the Hudson river, was navigating under her license in the character of a coasting vessel. This brought her within the operation of rule seven, and she was, therefore, in fault in not carrying the lights prescribed by that rule. If the collision had happened on the high seas, another question would be presented. In the case of the "Glaucus," which came before LOWELL, J., in the United States District Court, Massachusetts, referred to in a note in Parsons on Shipping and Admiralty (vol. 1, p. 562), which arose under the act of 1866 (U. S. Stats. at Large, vol. 14, chap. 234, § 11), of which section 4233 of the Revised Statutes is in substance a re-enactment, it appeared that the "Glaucus," a steamer bound from New York to Boston, came into collision with a sailing vessel on Long Island Sound. The steamer had, in addition to her two side lights, two white lights, one at her bow and one at her masthead. It was contended that she should have had only one white light. LOWELL, J., speaking of the act of 1866 said: "Its language does not seem to be very happily chosen. It puts ocean steamers and steamers carrying sail in one class, with one sort of light, and coasting steamers in another, with a different sort, whereas most of the coasting steamers on the Atlantic coast are both ocean-going and carrying sail, so that it may sometimes be difficult for the persons concerned to know to which order they belong." (See *"The Continental,"* 14 Wall. 345.) It is decisive there that the "Yosemite" at the time of the collision was navigating inland

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waters under a coasting license, and that by the explicit language of rule seven, she was bound to carry the central range lights.

The judgment should be reversed, and a new trial granted. All concur.

Judgment reversed.

104	96
110	611
104	96
114	326
104	96
126	658
104	96
149	80
104	96
152	898

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JOHN H. MILLARD, Respondent, v. ALFRED C. CHAPIN, Comptroller, etc., Appellant.

The discretion of the court to grant or refuse a writ of *mandamus* is not absolute but is governed by legal rules, and its exercise is subject to review here.

The sufficiency of the evidence upon which is based a decision of the State comptroller as to who is entitled to the purchase-money paid upon an invalid sale of land for taxes, which he is required to refund out of the state treasury (§§ 80, 83, 85, chap. 427, Laws of 1855), may not be reviewed by *mandamus*; nor can the decision, even if wrong, be so rectified.

The writ does not lie to compel an officer exercising judicial functions to make any particular decision or to set aside a decision already made.

The mere record of a deed from the purchaser at an invalid tax sale, is not notice to the comptroller of the right of the grantee to have the purchase-money refunded to him.

Although the statute of limitations does not apply to the issuing of a writ of *mandamus*, the writ should not be granted after the period fixed by statute as a bar to an action has expired, when the delay is unexplained and unaccounted for.

It seems, that the writ may also, in the discretion of the court, be denied when the delay in moving it is unreasonable, although it falls short of the time allowed for commencing actions

People ex rel. Millard v. Chapin (40 Hun, 386) reversed.

(Argued December 7, 1886; decided January 18, 1887.)

APPEAL from order of the General Term of the Supreme Court, in the second judicial department, made May 10, 1886, which reversed an order of Special Term refusing a peremptory writ of *mandamus*, and which directed the issuing of said writ,

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requiring the State comptroller to refund to the petitioner the purchase-money paid on an invalid sale of land for taxes. (Reported below, 40 Hun, 386).

It appeared, that, at the State tax sale in 1859, a number of parcels of land in Erie county were struck off to one Henderson, who assigned his bids to Maurice E. Viele, to whom the State comptroller executed conveyances of the lands. Prior to 1877, the comptroller refunded to Viele the purchase-money of twelve of the lots, and in that year, upon an affidavit of Viele that he had sold and conveyed to John M. Peck "all the right, title and interest acquired by him from the tax sale, * * * so far as his title had not been destroyed by redemption or cancellation;" and upon other evidence the comptroller refunded to Peck the purchase-price of the other lots. In September, 1863, Viele conveyed all of his interest in the lots so purchased by him (except a few that had been redeemed) to Ogden H. Osborn, which conveyance was recorded in Erie county, in July, 1864. Ogden died intestate and his heirs-at-law and next of kin joined in a conveyance to the petitioner of all their right, title and interest in said lands.

Further facts appear in the opinion.

Denis O'Brien, attorney-general, for appellant. Viele's deed to Osborn was not such an assignment as carried with it the title to the purchase-money paid by Henderson. (*King v. Trustees of St. Pat's Cath.*, 4 East 721; Laws of 1855, chap. 427, § 85; 1 R. S. 39, § 143; Gerard's Tit. to Real Es. 525; *Veila v. Rodriguez*, 12 Wall. 323; *U. S. v. Slinly*, 21 Fed. Rep. 894; *May v. Leldaire*, 11 Wall. 232.) The deed from Viele to Osborn did not operate as an equitable assignment of the purchase-money paid by Henderson. (1 R. S. 738, § 140; *Adams v. Conover*, 87 N. Y. 422.) If the deeds to Osborn and the relator operated as an assignment, then the comptroller was protected by payment to Viele and Peck. (1 R. S. 756; *Heermans v. Fellows*, 64 N. Y. 169.) Proof of payment by the State to the purchaser, or his immediate assignees of the certificate, was sufficient. The relator must

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show actual notice to the comptroller of the assignment to himself or to the person from whom he claims. (*Heermans v. Ellsworth*, 64 N. Y. 161.) The recording act has nothing to do with the assignment. (*Paige v. Waring*, 76 N. Y. 463.) Mandamus is not the proper remedy. If the comptroller committed any error, it should be reviewed by *certiorari*. (*Howland v. Eldridge*, 43 N. Y. 457; *People ex rel. Francis v. Com. Council*, 78 id. 33; *People ex rel. Hammond v. Leonard*, 74 id. 443; Code of Civ. Pro., § 2140; *People ex rel. Eq. L. As. Co. v. Chapin*, 39 Hun, 230; 103 N. Y. 635.)

Abram J. Rose for respondent. The order of the General Term, granting the writ of *mandamus*, was discretionary and is not appealable to this court. (*In re Sage v. L. S. & M. S. R. R. Co.*, 70 N. Y. 220; *People, ex rel. Lunney v. Campbell*, 72 id. 496; *People ex rel. Faile v. Ferris*, 76 id. 326; *People ex rel. Slavin v. Wendell*, 71 id. 171; *Platt v. Platt*, 66 id. 360.) The sale of 1859 was void, and the comptroller gave no title by his deed. (*Becker v. Holdridge*, 47 How. Pr. 429.) The act of 1855 was passed to provide against such invalid sales and to protect purchasers at tax sales. (Laws of 1855, chap. 427; 1 R. S. [7th ed.] 1031 §§ 83, 84, 85; *Corbin v. Com'rs of Wash. Co.*, 3 Fed. Rep. 356.) The deed from Viele and wife to Osborn carried with it the right to demand and receive the money from the comptroller that had been paid for the purchase. (3 R. S. [7th ed.] 2195 §§ 142, 143, 144.) Even if the deed passed no title to the land, because the grantor had none, yet it passed whatever interest and all interest the grantor had in the land or to the money, which stood in the place of the land. (*Jackson v. Bowen*, 7 Cow. 13; *Robinson v. Ryan*, 25 N. Y. 320; *Klock v. Buell*, 56 Barb. 398; *Danforth v. Suydam*, 4 N. Y. 66; *Spears v. Mayor, etc.*, 87 id. 359.) The comptroller had notice of this deed and he is estopped from setting upon any subsequent payment. (*Edward's Lessees v. Darby*, 12 Wheat. 210; *Potter's Dwarries*, 179.) *Mandamus* is the proper

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remedy. (Code of Civ. Pro., §§ 2120, 2122; *People v. Allen*, 42 N. Y. 408; *People v. Brown*, 55 id. 180; *People v. Clerk of Mar. Ct.*, 3 Abb. Ct. of App. 491; *Smith v. Comptroller*, 18 Wend. 659.)

DANFORTH, J. By petition verified October 6, 1885, the relator applied at Special Term for a peremptory *mandamus*, requiring the comptroller to pay him \$721.57, the sum, with interest, of moneys paid by a purchaser of fifty or more lots of land at an invalid tax sale made in 1859. The application was denied at Special Term, but its order was reversed and the writ granted by the General Term.

The objection of the relator that the order is not appealable to this court, is not well founded. The discretion of the court to grant or refuse the writ is not absolute, but governed by legal rules, and its exercise is subject to review. (*People ex rel. Gas-Light Co. v. Common Council of Syracuse*, 78 N. Y. 56.) We agree with the Special Term that the relator failed to show any right to a *mandamus*. On the contrary it appears that one Henderson, the purchaser at the tax sale, and who paid the price thereof to the comptroller, assigned his bids to one Viele, and the comptroller conveyed the lands by deed to him as such assignee on September 15, 1862. The sale was invalid because the notice to redeem was not in compliance with the statute. (Laws of 1855, chap. 427, § 61.) At various times between 1864 and 1877 the comptroller refunded to Viele the purchase-price of twelve of the lots now in question. On January 22, 1877, Viele made an affidavit, which, after reciting the conveyance to him by the comptroller, stated that on September 23, 1863, he sold and conveyed to John M. Peck "all the right, title or interest acquired by him from the tax sale of 1859, in the lands conveyed to him by the comptroller, so far as his title had not been destroyed by redemption or cancellation." This affidavit, with other evidence, was filed on that day in the office of the comptroller, and at different times thereafter, but prior to February 20, 1878, the purchase-price of all the

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remaining lots was refunded by him to the said John M. Peck. This was, I think, a full compliance with the statute, and relieved the comptroller from further duty in the transaction. By the statute (*supra*, §§ 83, 85), it is made his duty, upon discovering the invalidity of a sale for taxes, to cancel the sale and "refund out of the State treasury to the purchaser, his representative or assignee, the purchase-money and interest thereon." It is not necessary to decide whether or not the statute (*supra*), is limited to the purchaser at the tax sale, and the assignee of the bid or purchase; Viele stood, indeed, in that relation to Henderson, and with his assent the money, which he did not receive in person, was paid to Peck. Nor is it necessary to decide that the right to reclaim the purchase would or would not pass by a conveyance of the land, or merely follow the person of the original purchaser. For there was also evidence before the comptroller that Viele had conveyed the lands to Peck. The sufficiency of that evidence is not to be reviewed by *mandamus*, nor can the decision of the comptroller, even if wrong, be so rectified. He exercised a jurisdiction which the law entrusted to him; the result complained of was a judicial determination, and the writ does not lie to compel an officer, exercising such functions, to reach any particular decision, or set aside a decision already made. (*People ex rel. Equitable Life Ins. Co. v. Chapin*, 103 N. Y. 635.) The propriety of his conduct, however, seems unquestionable. He had before him, in legal effect, Henderson the purchaser, Viele, his assignee, and Peck, a claimant with the sanction of Viele, the only persons who seemed to be connected with the tax sale, and with them, so far as he knew he might lawfully, and was required by the statute to deal. Upon what, then, is the relator's contention founded? On February 13, 1885, Maria L. Osborn, the widow, and children, heirs-at-law of one Ogden H. Osborn, in consideration of \$25, conveyed to him by quit-claim deed the tax lands to which reference has already been made, and Maria L. Osborn, the administratrix of Ogden, also upon the same consideration, assigned to him all the interest which her intestate ever had,

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"of, in and to any tax certificate, or to any privilege, right or benefit under any tax certificate or certificates, and to any and all money which should be or should have been refunded or repaid to said Ogden H. Osborn or to her as administratrix by the comptroller of the State of New York for any redemption from tax sale or cancellation of tax sale, or as grantee or assignee of any purchaser, or assignee of any purchaser, at a tax sale, or for any other cause whatever."

Osborn was grantee of Viele under a deed bearing date September 15, 1863, acknowledged February 28, and recorded in the proper clerk's office July 6, 1864. The learned counsel of the relator argues "that the comptroller had notice of this deed, and so is estopped from setting up any subsequent payments." But I find no evidence of that. The mere record of the deed was not notice. Nor is there any foundation for the assertion that the comptroller recognized its existence in any way. It is said upon the relator's points that "the comptroller made a payment to Osborn upon the deed for one lot which had been redeemed." I find nothing of the kind in the case, and the folio, to which alone we are referred, contains merely a description of the lot, and in substance that its sale was canceled and \$15.68, the amount due, refunded by the comptroller to Ogden H. Osborn, March 21, 1864. Under what circumstances, or why this was done, does not appear; certainly there is no reference to a deed or other title acquired by Osborn. It, doubtless, indicates that Osborn was in some way shown to be entitled to the money, but it has no tendency to show that he was thought to be, or that he claimed to be entitled to the price paid for any other lot, or to be the assignee of the tax title or the sum bid, or the grantee even of the purchaser, or of the assignee of the purchaser. If any presumption is to be indulged in, it is that he made no such claim, for afterwards and in the same year, the comptroller refunded to Viele the price of other lots, and in successive years the residue, as above stated, to Viele or Peck. There is nothing to show that these payments were not made and received in good faith and under the belief on both sides that

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Viele and Peck were entitled to them. Their conduct indicates that. On the contrary, Osborn, if he had any rights, slept upon them so long that he must be deemed to have acquiesced in the claim of Viele and of Peck, or at least to have consented by his silence and inaction to the dealings of the comptroller with them as the lawful assignees of the purchaser. And although the statute of limitations does not prevent the issuing of the writ of *mandamus*, the damage and inconvenience resulting from the lapse of time are to be considered and the writ should not be granted after the period fixed as a bar for actions has expired (*People ex rel. Gas Light Co. v. Common Council, supra*), and if, as is claimed in behalf of the relator, he has no other legal remedy, his condition in this respect is not improved by that circumstance. When another remedy exists, the writ will not issue. It may also, in the discretion of the court, be denied when the delay in moving it is unreasonable, although it falls short of the time given for commencing actions, but after that time, when the delay is unexplained and unaccounted for, it ought not to be granted. In this case the period of the longest limitation for bringing an action, was permitted to pass. Upwards of twenty years from the discovery of the invalidity of the sale to the relator's purchase. If any right at any time existed in the relator's assignor, his delay in enforcing it was not only unreasonable, but to the prejudice of others.

Without adverting to other grounds on which the appellant, not without reason, relies, we think the relator's claim too stale to justify the interference of a court in its favor. The State and its officers are entitled to no less protection than a private litigant.

The order of the General Term should, therefore, be reversed and the order of the Special Term affirmed, with costs.

All concur.

Ordered accordingly.

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In the Matter of the Estate of ANDREW HOOD, Deceased.

104	103
124	202
104	103
75	AD 844

The failure of a surrogate to make findings of fact and law as required by the Code of Civil Procedure (§ 2545), upon the trial of an issue of fact before him, is not a ground of objection to his decision on appeal. It is the duty of the party appealing to procure to be made such findings or refusals as will present, through appropriate exceptions, the question he desires to argue; if he omits to do this, no question is presented for review. Although under a will it is possible for an executor to exchange the character for that of trustee, until he is discharged as executor by decree of the surrogate and directed to hold the remaining assets as trustee, or at least until there has been a payment to him as trustee, a new account opened and kept in the new capacity and a division of the fund, allotting to different beneficiaries their specific proportions, he remains as executor only, and is removable as such for misconduct. After such removal, upon petition of his successor, the Surrogate's Court has jurisdiction to compel him to account for and deliver over to his successor the assets in his hands (Code of Civ. Pro. §§ 2724, 2605.)

(Argued December 8, 1886 ; decided January 18, 1887.)

APPEAL from an order of the General Term of the Supreme Court, in the second judicial department, made February 9, 1886, which affirmed an order of the surrogate of Westchester county directing Frederick Hood, as late executor of the will of Andrew Hood, deceased, to render an account, and also an order of said surrogate directing said Frederick Hood to pay over to the remaining executrix the sum of \$31,775.

The material facts are stated in the opinion.

Edward P. Wilder and *A. J. Dittenhoefer* for appellant. The surrogate had no authority to direct the appellant to render an account as executor. (*In re Hood*, 90 N. Y. 512; 98 id. 371; *Uhlman v. Uhlman*, 51 Supr. Ct. 361.) The action pending in Kings county for an accounting is a bar to this proceeding. (Redf. on Surrogates [2d ed.] 642; *Chrystie v. Libbey*, 5 Abb. Pr. [N. S.] 192; *Wolff v. Maloney*, 12 Hun, 207.) The surrogate exceeded his authority in sustaining the unverified objections. (*In re Metzger*, 1 Bradf. 265; *Bainbridge v. McCullough*, 3 Sup. Ct. 468; *In re Frazer*,

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17 W. D. 129; 92 N. Y. 239; *Carroll v. Hughes*, 5 Redf. 337; *Boughton v. Flint*, 74 N. Y. 476; *Freeman v. Kellogg*, 4 Redf. 218; *In re Jones*, 24 Week. Dig. 333; *In re Hood*, 98 N. Y. 372.) The provision of the will directing the executors to pay out of the income of the "Eagle buildings" \$2,000 annually to the widow of the testator for life, after paying the expenses for repairs, insurance, taxes, etc., on the property; and if they deemed it advantageous to do so to sell the property and invest the sum realized from the sale for the purpose of creating a fund from which to pay said annuity created a trust. (*Bailey v. Bailey*, 28 Hun, 603; *Hurlburt v. Durant*, 88 N. Y. 121; *Marks v. McGlynn*, id. 375; *Laytin v. Davidson*, 95 id. 263; *In re Hood*, 98 id. 372; *Phoenix v. Livingston*, 101 id. 451.) The respondent, being a coexecutor and jointly liable with the appellant, cannot call upon him to account for and recover from him the full amount of the devastavit. (*Suydam v. Bastodo*, 21 Rep. 403; *Earle v. Earle*, 93 N. Y. 104-117; *Adair v. Brimmer*, 74 id. 539; *Laroe v. Douglas*, 2 Beav. 308; *Schenk v. Schenk*, 1 Green, 181; *In re Rugg*, 24 Week. Dig. 374.) The failure to make any findings of fact or conclusions of law renders the proceeding irregular. (Code of Civ. Pro. § 2545.)

John J. Macklin for respondent. Where an executor is removed, the remaining executor, where there is one, or a party in interest, may cite him to render an account of all moneys received by him or with which he is chargeable. (Code, §§ 2603, 2605, 2724, 2727, subd. 2; *Gerould v. Wilson*, 81 N. Y. 573.) The pendency of the Kings county suit was not a bar. (*Hood v. Hood*, 85 N. Y. 565; *Howell v. Chamberlain*, 60 id. 272; *Dawley v. Brown*, 77 id. 390; *Rogers v. King*, 8 Paige, 211; *Kuntz v. McNeil*, 1 Denio, 436; *In re Hood*, 27 Hun, 571; *S. C.*, 98 N. Y. 363, 369.) Where the issue raised by the exception is whether the payment or investment was authorized by law or the will, the burden of showing the propriety of the investment remains with the executor. (Redf. Pr. 500, 780.) The surrogate was right in

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denying the motion for an adjournment. The excuse was insufficient; to grant it or not was clearly discretionary, and the General Term having affirmed the ruling it is not reviewable here. (*Greenleaf v. Brooklyn F. Co.*, 23 Week. Dig. 423; *Smith v. Alker*, 102 N. Y. 87.) Waste and misapplication of the assets were clearly shown, and the surrogate was bound to order their replacement. (*Hood v. Hood*. 85 N. Y. 578.)

FINCH, J. The petition presented to the surrogate asserted as the ground of the relief sought, that Frederic Hood and the petitioner had been originally appointed executor and executrix of the last will of Andrew Hood; that the letters testamentary issued to Frederic Hood had been revoked for his misconduct, leaving the petitioner sole remaining representative of the estate; that previous to such revocation and about January, 1869, the said executor had collected bonds and mortgages which were assets in his hands amounting to between forty and fifty thousand dollars; and upon these facts the petitioner asked for an order that the removed executor account for and deliver over to the executrix the assets remaining in his hands. The Code authorizes the surrogate to call an executor or administrator to account where the letters have been revoked (§ 2724), and more specifically provides that "the surrogate's court has the same jurisdiction upon the petition of the successor or of a remaining executor, administrator, guardian or trustee, to compel the person whose letters have been revoked to account for or deliver over money or other property and to settle his account, which it would have upon petition of a creditor or person interested in the estate, if the term of office conferred by the letters had expired by its own limitation." (§ 2605.) Upon the petition filed the surrogate had jurisdiction to grant the relief sought. The executor's answer alleged that he had accounted before the surrogate in 1869, for all assets held by him in that character, and that thenceforward he retained the balance in his hands as testamentary trustee. Other defenses were pleaded but

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need not be here stated for reasons which will appear. On the hearing the surrogate made an order requiring the appellant to account as executor, and the latter having filed an account the surrogate made a final order adjudging that the appellant held nearly thirty thousand dollars received as executor which he should pay over to the petitioner. From each of these orders which have been affirmed by the General Term the removed executor appeals. Whether the order to account was merely preliminary, or final in so far as it adjudged the character in which the assets were held (*In re Halsey*, 93 N. Y. 48), is of no consequence in view of the fact that the appeal from the order finally rendered by its terms brings up for review the order to account.

The return shows that the surrogate made no findings of fact or law as is now required (Code, § 2545; *Angevine v. Jackson*, 103 N. Y. 470), and that no exceptions were taken to his decision or decree in any form. But on the hearing and during its progress three exceptions were taken and only three. These raise the sole questions available to the appellant in this court. His own counsel suggest the absence of requisite findings, insisting that for such cause the decree is irregular. That does not follow. It is the duty of the party appealing to procure to be made such findings or refusals as will present, through appropriate exceptions, the questions which he desires to argue. If he suffers this necessary step to be omitted he will find himself without the means of reviewing the rulings of which he complains. The three exceptions taken are, therefore, the sole basis and mark the limits of this appeal.

These were, first, to the admission of the order revoking the executor's letters testamentary; second, to a ruling which sustained an objection to an inquiry whether he had acted as executor since the decree of 1869; and third, to the question what he had done with the bonds and mortgages left in his hands after that decree. The first two exceptions are without merit, and indeed are not relied upon or argued in the appellant's brief. The third exception raises the only ques-

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tion open for consideration. The ground of objection stated was that after the defendant's final accounting in 1869 his responsibility as executor ceased, and the funds in his hands were held by him as trustee, and what became of them was totally immaterial on a proceeding against him as executor. But this defense we have already held to be untenable. When the case was first before us (85 N. Y. 561), we decided that by the will of Andrew Hood there was an equitable conversion of the real estate into personalty, and that for the proceeds of its sales the executor was accountable in that capacity. At a later period the order revoking his letters testamentary came up for review (98 N. Y. 363), and we then held, passing by the inquiry whether under the will it was possible for him to exchange the character of executor for that of trustee, that he had not effected such exchange, and remained executor only and removable as such for his misconduct in that capacity. We pointed out that on the accounting in 1869 he was not discharged, was not directed to hold the remaining assets as trustee, was not credited with such transfer and his account thereby balanced, but the decree entered directed as to the assets remaining that "the said executor shall hold and invest pursuant to the powers and directions contained in said last will and testament." There had been no payment to the defendant as trustee, no new account opened and kept in the new capacity, and no separation or division of the fund allotting to the beneficiaries their exact and specific proportions. If the question had respected commissions it was shown that our own decisions would have compelled us to hold that the defendant could not be entitled to them in the character of trustee. Our decision intermediate the two referred to does not affect the present appeal, since the removal of the executor is a new fact which has occurred since the decree of 1869 and brings with it new rights and responsibilities.

The order and decree should be affirmed with costs.

All concur.

Order affirmed.

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LELAND FAIRBANKS, Jr., Appellant, v. WINTHROP SARGENT,
as executor, etc., Respondent.

104	108
117	328
118	358
104	108
125	352

104	108
139	144

104	108
137	456
137	540

104	108
147	288

104	108
s117	320
162	552

104	108
167	207

104	108
d169	*324

Where the owner of a chose in action, after a transfer for a good consideration of an interest therein to one person, assigns and transfers the same to a *bona fide* purchaser with authority to collect, the latter is not entitled to retain the whole proceeds of collection. The first transferee acquires an equitable lien upon the proceeds of collection to the extent of the interest transferred to him: the second transferee takes subject to such lien, and an action is maintainable against him to enforce the same.

As between different assignees of a chose in action by express assignment from the same person, the one prior in point of time will be protected although he has given no notice of such assignment to either the subsequent assignee or the debtor.

One U., being the owner of a claim resting in open account against Z., who disputed his liability, entered into a contract with plaintiff, an attorney, by which, among other things, it was agreed that plaintiff, for his services in endeavoring to collect the claim should, in case suit was brought thereon, have one-third of whatever should be collected or in any way realized thereon. U. retained the right to decide upon the terms and mode of settlement and to name the attorney, in case suit was brought in another State. Plaintiff thereafter, by the direction of U., caused suit to be brought upon the claim in New Jersey, through an attorney selected by U., and while such suit was pending, the latter, by a written assignment, absolute in form, made without plaintiff's assent or knowledge, transferred his interest in the claim to S., at whose request U., agreed to a settlement by authorizing S. to accept certain bonds in satisfaction of the claim. In pursuance of this agreement, U. directed the attorneys in New Jersey to discontinue the suit, and executed a release of all claims against Z., to be delivered to him upon his delivery of the said bonds; S. executed a release of all his claims against U. and reassignments of certain other claims held by him also as collateral, which were considered of no value, to be delivered to U., after he should have received and forwarded the bonds to S. The arrangement was consummated, and S. received the bonds in ignorance of any interest of plaintiff in the claim. *Held*, that an action was maintainable on the part of plaintiff to recover one-third of the bonds so received by S., or the value thereof; that the agreement between plaintiff and U. constituted an equitable assignment and gave plaintiff an equitable lien upon the proceeds of the settlement to the extent of the one-third, and S. took subject to such interest; that it was not necessary in order to make such assignment or lien valid, that

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notice thereof should be given to the debtor; and that the facts that U. reserved the right to name the attorney to bring the suit, and to determine the terms and mode of settlement did not in any manner detract from the validity of the agreement with plaintiff as an equitable assignment

The case of *Bush v. Lathrop* (23 N. Y. 535), stands in full force save as modified by subsequent decisions, excluding from the operation of the principles there laid down the case of a purchase in good faith of a non-negotiable instrument from an assignee of the real owner upon whom such owner has conferred, by his assignment, the apparent absolute ownership, where the purchase has been made in reliance upon such apparent ownership.

Also, *held*, that the real nature of the transaction between U. and S. was not a transfer from the former to the latter of the securities received from Z., but that S., in fact and in law, received them from Z.

It seems, that even if it could be held that S. received from U. the said bonds, he was not a *bona fide* holder, as they were not acquired by him for a valuable consideration or in the ordinary course of business.

Fairbanks v. Sargent (39 Hun, 588) reversed.

(Argued December 8, 1886; decided January 18, 1887.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made the first Monday of March, 1886, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term. (Reported below, 39 Hun, 588.)

This action was originally brought against Henry W. Sargent, the present plaintiff's testator, to recover one-third of forty bonds to which one-third interest plaintiff claimed a right as equitable assignee.

The material facts are stated in the opinion.

A. C. Brown for appellant. The bonds were non-negotiable. (1 Burrill's Law Dict. [Bills Single and Penal]; 2 id. 470; Bouviers' Law Dict. [Bills Obligatory]; *Farmers & Mech's Bk. v. Grenier*, 2 Sergt. & Rawle, 115; *Arnold v. R. R. V. U. R. R. Co.*, 5 Duer, 207; *Hodges v. Shuler*, 22 N. Y. 114; 1 Pars. on Con. 26; Chit. on Bills, marg. 166; *Clark v. Farmer's Woolen Mfg Co.*, 15 Wend. 256; *Warren v. Lynch*, 5 John. 239; *Helper v. Alden*, 3 Min. 332; *Covell v. Tradesman's Bk.*, 1 Paige, 131; *Foster v. Floyd*, 4

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McCord, [S. C.] 159; *Conine v. Junction, etc.*, 3 Houst. [Del.] 288; *Hooker v. Gallagher*, 6 Fla. 357; *Dinsmore v. Duncan*, 57 N. Y. 573, 577; *Walker v. Scott*, 13 Ark 644-647; *Miller v. McIntyre*, 9 Ala. 638; *Sayre v. Lucas*, 2 Stew. [Ala.] 259; *Parks v. Duke*, 2 McCord, [S. C.] 381; *Mann v. Sutton*, 4 Rand. [Va.] 253; *Brown v. Jardahl*, [Minn.] 18 Rep. 278; *Osborn v. Restlers*, 35 O. St. 99; Biddle on Law of Stock Brokers, 157; *Martin v. Cole*, 9 Hun, 98; *Rawson v. Davidson*, 49 Mich. 607; *Birkenhead v. Brown*, 5 Hill, 635, 646; *Glyn v. Baker*, 13 East 509; *Couch v. Credit Foncier of England*, 29 L. T. R. [N. S.] 259-265; Edw. on Bills, [2d ed.] marg. 209; *Hopkins v. R. R. Co.*, 3 Watts & Sarg't 410; *Railroad Co. v. Howard*, 7 Wall. 415; *Richards v. Waring*, 39 Barb. 42 1 Keyes, 576; Daniel on Neg. Inst. [3d ed.] 488.) Even if the bonds of individuals are negotiable the bonds in question were not within that description, nor were they in the form of negotiable instruments. (Daniel on Neg. Inst. [3d ed.] §§ 91, 50, 79, 263.) These non-negotiable bonds were choses in action, and Sargent was the assignee thereof of Underwood. But the assignee of a chose in action can take no greater right or interest than his assignor possessed, and, except in the case of negotiable paper, is chargeable with all the equities that apply to him, and this is so even though he purchases without notice and for value. (*Ely v. McKnight*, 30 How. Pr. 97; *Commercial Bk. of Rochester v. Colt*, 15 Barb. 506; *Blydenburgh v. Thayer*, 3 Keyes, 295; *Weaver v. Borden*, 49 N. Y. 286; *Mech's. Bk. v. N. Y. & N. H. R. R. Co.*, 13 id. 629; *Callanan v. Edwards*, 32 id. 486; *Anderson v. Nichols*, 28 id. 603; *Ballard v. Burgett*, 40 id. 314; Lewin on Trusts [5th Eng. ed.] 619; *Mangles v. Dixon*, 3 H. of L. Cases, 702, 731; *Ford v. White*, 16 Beav. 120; *Phillips v. Phillips*, 4 De G., F. & J. 208.) If the bonds were negotiable, and it were material whether or not Sargent took them with notice, or whether or not he paid value for them, as matter of law, he had sufficient notice of plaintiff's claim and he paid no value for the bonds, although the trial court

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found to the contrary. (*Taylor v. Bates*, 5 Cow. 376; *Ogilvie v. Jefferson*, 6 Jur. N. S. 970; *Dunn v. Hornbeck*, 72 N. Y. 80, 89; *Fulton Bk. v. N. Y. & S. C. Co.*, 4 Paige, 128.) Sargent, by receiving the bonds from Gray, ratified the acts of Gray, and so constituted him his agent, even if Gray had had no authority to act for him prior to the settlement. (*Meehan v. Forrester*, 52 N. Y. 277; *Jennings v. Moore*, 2 Vernon, 609.) The agreement between the plaintiff and Underwood was lawful. They had a right to determine the measure and mode of compensation to be made to the plaintiff for his services. (*Rooney v. Second Ave. R. R. Co.*, 18 N. Y. 368, 373; *Ely v. Cooke*, 28 id. 365; S. C. [below] 2 Hilt. 406; *Coughlin v. N. Y. C. & H. R. R. Co.*, 71 N. Y. 443, 449; *Fowler v. Callan*, 102 id. 395.)

John Clinton Gray for respondent. The agreement between plaintiff and Underwood constituted no assignment of the action against Zabriskie to plaintiff, nor of the proceeds of any settlement or judgment therein. (*Trist v. Child*, 21 Wall. [U. S.], 441; *Rogers v. Hosack's Ex'rs.*, 18 Wend., 334; *Hoyt v. Story*, 3 Barb. 264; *Bradley's Case*, Ridg. Rep. temp. Hardwicke, 194; *Williams v. Ingersoll*, 89 N. Y. 518; *Wright v. Wright*, 70 id. 96; *Pulver v. Harris*, 52 id. 73.) The agreement vested in plaintiff no title or property in the Zabriskie suit which he could assert, nor was it any appropriation of the funds or proceeds to be recovered. (*Bradley's Case*, Ridg. Rep. temp. Hardwicke, 194, *Roger v. Hosacks Ex'r.*, 18 Wend. 334; *Hoyt v. Story*, 3 Barb. 264.) Where no absolute necessity exists, the court will not presume a trust. (*Cook v. Fountain*, 3 Swanst. 591.) Even where the attorney of record claims a lien under an agreement respecting his compensation, it must be made to appear that notice of the agreement was given, where the cause of action is assignable. (*Walsh v. Flaxbush, etc.*, R. R. Co., 11 Hun, 190; *Coughlin v. N. Y. C. & H. R. R. Co.*, 71 N. Y. 444.) The facts disclose nothing more than a simple and legitimate transaction between Sargent as creditor and Under-

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wood as debtor, whereby Underwood obtained a compromise with Sargent, and by paying \$20,000 released his collaterals and undue note, and got a full release of all claims and demands, etc. (*Raphael v. Bk. of England*, 17 C. B. 161.) For motives of policy and for the sake of safety in commercial transactions, the court should not interfere with defendant's possession of the bonds in question for they were negotiable coupon bonds, payable to bearer, and passed by delivery. (*Murray v. Lardner*, 2 Wall. 110; *Mercer Co. v. Hackett*, 1 Wall. 83; *Gelpecks v. Dubuque City*, id. 206; *Grant v. Vaughan*, 3 Burr. 15, 16; *Collins v. Martin*, 3 B. & P. 646; *Brainard v. N. Y. & H. R. R. Co.*, 25 N. Y. 498; *In re Leland*, 6 Benedict [N. S.] 175.) The equities of the plaintiff are not equal to the equities of the defendant. Sargent has the best equity because he parted with his property. (*Rice v. Rice*, 2 Deering, 73; *Colyer v. Finch*, 5 H. L. Cases, 905, 920; *Livingston v. Dean*, 2 Johns. Ch. 479; *Murray v. Lylburn*, id. 441; *Taylor v. Gitt*, 10 Barr, 428; *Mott v. Clark*, 9 id. 399.) The defendant is in the position to avail himself of the plea that his testator was a *bona fide* holder for value without notice, and it is now well settled that such a plea is available for the protection of an equitable, as well as a legal holder. (*Moore v. Met. Bk.* 55 N. Y. 41; *McNeill v. Tenth Nat. Bk.*, 46 id. 325; *Park Bk. v. Watson*, 42 id. 490; *Bay v. Coddington*, 20 Johns. 637; *Colyer v. Finch*, 5 H. L. Cases, 920.) The plaintiff suffered Underwood to retain all the indicia of property and ownership and to the world he appeared as the absolute owner of the claim and the recovery. (*Queen v. Shropshire Co.*, L. R. 8 Q. B. 420, 441, 442.) The plaintiff can, in no event, recover because the payment of the bonds to Sargent was not merely to cancel a pre-existing indebtedness. (Willard's Eq. Jur. [Rev. ed.] § 256; *Coddington v. Bay*, 20 Johns. 637; *Farlington v. Frankfort Bk.* 24 Barb. 554; *Park Bk. v. Watson*, 42 N. Y. 490; *Lawrence v. Clarke*, 36 id., 128.) Where the true owner holds out another, or allows him to appear as the owner of, or as having full power of disposition over the prop-

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erty, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. (*McNeil v. Tenth Nat. Bk.* 46 N. Y. 325; *Moore v. Met. Nat. Bk.* 55 id. 41.)

RUGER, Ch. J. The principal question presented by this appeal, when reduced to its simplest form, is whether a part owner of a chose in action, having authority to collect it, is entitled to retain the whole proceeds of such collection as a *bona fide* purchaser, if received by him in negotiable securities from the debtor.

Were it not that the courts below have answered affirmatively, we would have hardly supposed a contrary conclusion susceptible of reasonable doubt.

Other questions, incidentally involved, also appear from the facts, which, as found by the court, are substantially as follows: In January, 1869, Underwood owned a claim, resting in open account, against Zabriskie, arising out of stock transactions between them, upon which he claimed a balance due him exceeding \$100,000. Zabriskie disputed his liability thereon and Underwood, not being able to obtain payment, entered into a contract in writing with the plaintiff, an attorney residing in the city of New York, by which it was agreed between them, that the said Fairbanks, for his services in endeavoring to collect certain claims owned by Underwood, among which was that against Zabriskie, "is to have one-sixth of whatever amount of money, securities, or property shall be received on account of such claims as shall be settled without suit, and one-third of whatever amount of money, securities or property shall be collected, or in any way be realized or received (whether on settlement or without settlement), on account of such of said claims as shall be put in suit, either in this or any other State or country," said Underwood "is to decide upon the terms and mode of settlement as to each and every of said claims, whether such settlement be before or after suit brought;" also to determine whether or not suits should be brought, and if brought out-

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side of the State, to determine who should be the attorney therein.

In January thereafter Fairbanks, by Underwood's direction, caused suit to be brought to recover the claim against Zabriskie in a court of competent jurisdiction in the State of New Jersey, that being the State where Zabriskie resided, and the action was steadily prosecuted by Fairbanks until it was settled as hereafter stated.

In 1871 Underwood being indebted to Henry W. Sargent, the defendant's testator, by an assignment in writing, absolute in form, transferred his claim against Zabriskie to Sargent as collateral security. On or about June 18, 1872, Underwood, at the urgent request of Sargent, and without the knowledge of the plaintiff, agreed to a settlement of the claim against Zabriskie by authorizing Sargent to accept from him forty bonds, being part of a series of 200, for \$500 each, having nine coupons for the payment of half yearly installments of interest payable to bearer, attached to each, and purporting to be made by one Sarah R. Haight, as executrix of the estate of Richard K. Haight, her deceased husband. By these bonds Sarah R. Haight agreed, as executrix, at a specified time to pay the same and also to pay semi-annual interest thereon according to the terms of said coupons, and also represented thereby that she had secured such payments by a trust mortgage executed by her as executrix, upon certain real estate situated in the city of New York and represented to be property, belonging to the estate of Richard K. Haight.

In pursuance of this agreement Underwood wrote and delivered to one Gray, the agent of Zabriskie, a written order addressed to the attorneys in New Jersey who had charge of the action against Zabriskie, stating that the action had been settled, and directing them to discontinue it upon payment by Zabriskie of their costs and charges and those of the referee. Underwood also, at or about the same time, executed and delivered a release of all claims against Zabriskie, to Gray to be delivered to Zabriskie, upon payment of the sum agreed upon for such settlement.

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About June eighteenth Sargent, through his agent Monell, also delivered to Gray a duly executed release from Sargent to Underwood, of all claims and demands which Sargent had against Underwood, and also executed reassignments of the securities received by him from Underwood as collateral, with instructions to Gray to deliver them to Underwood after he should have received and forwarded to Sargent, the bonds received in settlement.

It also appears from the evidence that Zabriskie had notice of the assignment of the claim to Sargent, previous to the settlement, and authorized the delivery of the bonds to Sargent upon receiving a discharge from his liabilities to Underwood.

It must, under the findings of the trial court, also be assumed that neither Sargent nor Monell, at the time of such settlement, had any knowledge of the interest in the proceeds thereof, which was claimed by the plaintiff.

Under these circumstances, Fairbanks brings this action against Sargent to recover one-third of the bonds so received, or the value thereof, upon the ground that the agreement between him and Underwood constituted an equitable assignment of one-third of the property received on such settlement.

The first question in the case is as to the nature and extent of the right taken by Sargent in the Zabriskie claim by virtue of the assignment thereof to him by Underwood, and the rights growing out of the subsequent transactions between the parties.

Inasmuch as the Zabriskie claim was evidenced by no written acknowledgment from the debtor and was disputed by him, and was, from its nature, incapable of physical possession or manual delivery, no assignee from Underwood would acquire any superior right over any other assignee, by virtue of any possession or apparent ownership of the claim by his assignor. (*Muller v. Pondir*, 55 N. Y. 332.)

One assignee of such a claim from the owner must necessarily acquire the same interest in it that any other assignee does, and that is, in the absence of other controlling equities, an interest subject to the rule that he who is prior in point of

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time is prior in right. Such a claim is at common law non-assignable, and its assignee, takes by virtue of an assignment thereof, an equitable interest only, which must be governed by equitable rules for its protection and enforcement. (*Moore v. Met. Bk.*, 55 N. Y. 41; *Ford v. White*, 16 Beavan, 120; *Phillip v. Phillip*, 4 De. G. F. & J. 208.)

It is undoubtedly the general rule that the assignee of a chose in action takes it subject to all the equities existing against it in the hands of his assignor, and can acquire no greater right or interest therein than belonged to his transferror.

It was said by Judge DENIO, in *Bush v. Lathrop* (22 N. Y. 535), that "the purchaser of a chose in action takes the interest purchased subject to all the defenses, legal and equitable, of the debtor who issued the security. * * * In the transmission of property of any kind from one person to another, the former owner can, in reason, only transfer what he himself has to part with, and the other can only take what is thus transferred to him. * * * It is unnecessary to refer to authorities for this general principle, or to point out the exceptions to it which have been created by the custom of merchants or by positive statutes. It is enough that the present case is not claimed to fall within any of those exceptions. But the rule, if limited in the manner I have stated it, does not aid the plaintiff; for it is not the equity of the debtor in these securities which is the question, but of the plaintiff's interest against Preston, his immediate assignee; and the question is, whether the defendant is to be deemed to have purchased subject to this equity, or whether his assignment confers upon him a better title than his assignors, who were confessedly liable to it, had. The defendant claims that this is a latent equity, available only between the parties to it, and that it did not accompany the security when it passed into the hands of a subsequent owner," The learned judge quotes the rule laid down by Lord THURLOW, that "a purchaser of a chose in action must always abide by the case of the person from whom he buys."

Bush v. Lathrop has been criticised in subsequent cases,

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and so far modified, as to exclude from the operation of the principles there laid down, the case of a purchase in good faith of a non-negotiable instrument from an assignee of the real owner, upon whom he has by assignment conferred the apparent absolute ownership, when such purchase has been made in reliance upon the title apparently acquired by such assignee.

This modification is placed upon the ground of estoppel and it is held that the real owner has by the act of investing another with the apparent ownership of the property, estopped himself from disputing the title of one, who thereafter acquires it in good faith from such assignee. (*McNeil v. Tenth Nat. Bk.*, 46 N. Y. 325; *Moore v. Met. Bk.*, 55 id. 41; *Armour v. Mich. C. R. R. Co.*, 65 id. 111, 122.)

We understand the rule stated in *Bush v. Lathrop*, with the exception mentioned, stands in full force unquestioned. (*Ballard v. Burgett*, 40 N. Y. 314; *Weaver v. Barden*, 49 id. 286; *Moore v. Met. Bk.*, *supra*.)

Assuming, therefore, that Sargent could acquire from Underwood only such right as remained in him, after his agreement with plaintiff, it becomes material to inquire what rights, legal or equitable, were vested in Fairbanks by Underwood prior to the assignment to Sargent.

It is to be observed that plaintiff's claim does not rest for its support upon a lien as attorney rendering legal services for a client, but grows wholly out of the interest transferred to him by force of his agreement. It is also important to notice that this contract does not contain a provision by Underwood to pay plaintiff from the fund produced, or otherwise, but is an engagement that plaintiff shall have one-third of the proceeds of the collections in specie, or in such form as they shall be received from the debtor.

In the opinion of the learned judge writing at General Term, concurred in by the whole court, it was held that he did acquire an equitable lien upon one-third of the proceeds of the collection, and we concur in the opinion there expressed.

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In addition to the authorities relied upon below, we also think the case is covered by our decision in *Williams v. Ingersoll* (89 N. Y. 508). It appeared in that case that certain attorneys were employed to transact the legal business required in the prosecution and defense of certain claims by one H. under an agreement that they were to be paid for their services out of any moneys H. should obtain or become entitled to from any of the suits or proceedings, and should have a lien thereon for all sums that might be owing or due them for their said services, which lien should be superior to any right which H. might have.

All of such actions and proceedings, among which was a claim by H. for damages in an action for malicious prosecution, were afterwards submitted to an arbitrator and he awarded to H. damages for such malicious prosecution in the sum of \$10,000, which was attempted to be reached by certain attaching creditors of H.

It was held that the agreement operated as an equitable assignment to the attorneys of the award, and although not effective to transfer the cause of action for malicious prosecution by reason of its non-assignability, it yet attached to the award when it was made and was superior to any right of H. or those of his attaching creditors; that it was not needful in order to make such assignment or lien valid, that notice thereof should be given to the debtors, as the only effect of a want of notice would be to validate a subsequent *bona fide* payment of the award by them; and that as between different assignees of a chose in action by express assignment from the same person, the one prior in point of time will be protected, though he has given no notice to either the subsequent assignee, or the debtor, of such assignment. The court cited *Muir v. Schenck* (3 Hill, 228); *Greentree v. Rosenstock* (61 N. Y. 583); and *Freund v. Importers & Traders' National Bank* (76 N. Y. 352).

The case of *Wylie v. Cox* (15 How. [U. S. R.] 415), seems also to be directly in point.

The fact that Underwood reserved the right of naming the

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attorney who should conduct the prosecution of the claim when sued in a foreign state, or the right of determining the terms and mode of settlement, does not in any manner detract from the validity of the agreement as an equitable assignment. These provisions might affect the amount recoverable by the assignee in case of settlement, but it would be an unwarrantable construction of the contract to say that they were intended by the parties to defeat the main object of the agreement. Both assignor and assignee were equally interested in swelling the amount to be recovered, and it is not at all strange that Fairbanks should assent to a condition which would not probably injuriously affect him, and which Underwood had a right to impose as a limitation upon the interest intended to be conveyed.

It is quite clear that Fairbanks had done all that he could do to protect his interest in the Zabriskie claim; he had taken all the possession of the subject of which it was susceptible; he had evidenced his right by requiring a written agreement from the owner stating its consideration and extent, and he had assumed the control of the claim and was openly engaged in its prosecution to the knowledge of all parties. He was under no obligation to give notice of his rights to any party in order to perfect them, and could not have limited their control over the litigations, or the disposition of the proceeds thereof by Zabriskie, if he had done so.

By the terms of his agreement with Underwood he had precluded himself from interfering with any mode of settlement which Underwood desired to make, and this right was transferred by Underwood to Sargent and belonged exclusively to him, at the time such settlement was made.

It is claimed that Fairbanks should have notified Monell of his interest in the Zabriskie claim when an interview took place between them in July, 1871, and that in some way he has precluded himself from asserting an interest in the proceeds of the settlement by reason of his neglect to do so. There is no foundation for such a claim.

In the interview in question Monell informed Fairbanks, in

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substance, that he wished to obtain information of the condition of the Zabriskie claim, as his client, one Sargent, held a demand against Underwood and was desirous of knowing what prospects he had of realizing something on it from that source.

Although Sargent then and for some months previous had been the actual owner of the claim, Monell not only suppressed that fact, but left it to be inferred that his only interest in the claim was the amount which he expected to obtain from Underwood as voluntary payment out of the proceeds thereof, and Monell then urged Fairbanks to continue the vigorous prosecution of the action.

We can see nothing in this statement that imposed any duty upon Fairbanks to disclose to Sargent or any other creditor of Underwood's the conditions of the contract under which he was prosecuting this claim.

If Monell had then informed Fairbanks of any intended action on the part of Sargent with reference to such claim, which should assume the absence of any interest by Fairbanks in the proceeds thereof, a different question might arise, but the notice to Fairbanks was disingenuous and equivocal, and suppressed the only information which it was important for Fairbanks to know, or for Sargent to give. Fairbanks could not have supposed that Sargent was then the sole owner of the Zabriskie claim, or that he was then, or expected soon to be engaged in a secret or clandestine effort to settle it, and absorb the proceeds of the litigation, to the exclusion of the attorney who was carrying it on.

Monell was himself a lawyer, and must be presumed to know, from the usual course of such business, that an attorney prosecuting a claim for an insolvent client, presumptively has an interest in the subject of the action, and he was under the obligation of good faith and fair dealing, to notify him of any disposition then known to him, which had been made of the claim involved, or of any attempt to assume control of and take the fruits of the litigation by a settlement thereof.

The disposition with which Monell interviewed Fairbanks is quite evident from the fact that when he set on foot the negotia-

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tions by which the litigation was finally settled, although carried on in the same city where plaintiff resided, he was not consulted by any of the parties, or informed as to the negotiations, and his interests therein, although they were known to both Gray and Underwood and must also, to some extent, have been suspected by Monell, were wholly ignored by all the parties to the negotiations.

Sargent thus received the whole fruits of a litigation which, it is fair to assume, was the result in a great measure of the services and disbursements of Fairbanks rendered and expended to a considerable extent after Sargent had acquired his interest in the claim.

Every consideration of equity requires that such a claim should be protected, and there is nothing in the facts of the case upon which a superior equity in favor of Sargent's claim can justly be predicted.

The judgment of the General Term, however, was placed upon the ground that Sargent became the *bona fide* holder of the bonds in question by reason of the delivery thereof to him by Underwood, and the execution and delivery to Underwood by Sargent of a release of all claims and demands held by him against Underwood, and the reassignment of certain alleged securities held by Sargent as collateral to Underwood's debt.

Aside from the question as to whether the securities in question were negotiable paper it seems to us that the conclusions of that court, are not sustainable. If they are, it is quite clear that the subsequent assignee of a chose in action will be enabled to possess himself of the entire proceeds of the collection thereof to the exclusion of a prior assignee provided he obtain payment thereof, from the debtor in money or negotiable securities, and it seems to me to effect the abrogation of the rule that an assignee of a non-negotiable chose in action takes it subject to the equities of prior assignees.

We are, however, of the opinion that the court below misconceived the real nature of the transaction through which the collection of the Zabriskie claim was effected, and that Sargent, in fact and in law, received the bonds from Zabriskie and not from Underwood.

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Even if the theory of the General Term were correct, as to the person from whom Sargent received the bonds, we are of the opinion that the consideration paid by Sargent to Underwood was not sufficient to make him a *bona fide* holder thereof.

Upon such settlement Sargent delivered to Underwood three several instruments consisting of two reassignments and a release. The reassignments were of two claims previously assigned to Sargent by Underwood as collateral security for his debt.

The Zabriskie debt at the time of its reassignment had been settled and discharged and was necessarily valueless. The other claim is somewhat vaguely described, but it was testified to by Monell, that it was considered of no value both by himself and his client Sargent. The release was one executed by Sargent to Underwood discharging him from all debts and demands held by Sargent. This release was the discharge of an insolvent from an antecedent liability. It was not, however, executed in consideration of receiving the bonds in question, for those, as we shall hereafter see, were received and held by virtue of an equitable right, already possessed by Sargent, and not by reason of Underwood's consent thereto.

The only legal consideration for this release was, therefore, Underwood's consent to the settlement, which precluded him from afterwards claiming that the Zabriskie claim was more valuable, than the amount received in satisfaction thereof.

Even if it be admitted that Sargent delivered this release in consideration of the receipt of the bonds it would constitute him a *bona fide* holder to the extent only of the value parted with by him. (*Moore v. Ryder*, 65 N. Y. 438, 442; *Cardwell v. Hicks*, 37 Barb. 458; *Lawrence v. Clark*, 36 N. Y. 128.)

Upon the facts stated it is quite apparent, however, that he parted with nothing of value to Underwood.

We think the courts below were misled by looking more at the form of the transaction than at its legal effect.

It is immaterial in what form the parties chose to put the

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transaction if it is not in accordance with its legal effect, for equity will consider and adjudicate the rights of the parties according to the real nature of the transaction, without regard to its form. At the time the settlement was effected, Sargent was the apparent equitable owner of the Zabriskie demand, claiming to be its real owner, but concededly possessed of the absolute right to settle and discharge it and receive the proceeds of the collection, and Zabriskie had notice of these rights.

Sargent required no authority or consent from Underwood to authorize him to effect the settlement, and Zabriskie had no right or authority to settle and pay the claim to any one but Sargent.

Underwood never, actually or theoretically, had the bonds in his possession, and the only office he was called on to perform, in connection with the settlement, was to approve the act of his assignee Sargent in receiving \$20,000, as a satisfaction thereof, and to execute a release to Zabriskie after the settlement was effected.

Such a release would have been entirely ineffectual for any purpose if it had not been subsequently ratified by Sargent and was of no more effect than if executed by Sargent or any other agent of his.

The only effect, therefore, of Underwood's consent to the settlement and execution of the release was to deprive him of the right of subsequently claiming against Sargent that it had been satisfied for less than the real value of the claim.

The consideration paid to Underwood was, therefore, wholly and exclusively for the acquisition of this right, and did not affect in any way Sargent's right or authority to settle the action or receive the proceeds thereof from Zabriskie.

The cause of action here was not put upon any interest in the bonds claimed to have existed before their transfer to Sargent, or upon the invalidity of the title acquired by him, but it is based upon the claim that they were valid securities in his hands, and that plaintiff's equities attached to them upon his receipt thereof.

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Sargent was equitably chargeable with the duty of guarding the interest of his co-owner in the proceeds of the Zabriskie claim, and this, whether he was informed of such interest or not. The want of such notice did not, as we have seen, affect the validity of plaintiff's claim.

The question in the case, therefore, is whether, after Sargent acquired possession of the bonds, he became subject to any liability to third persons, by virtue of any prior equity existing in their favor in respect thereto.

Underwood, in his agreement with Fairbanks, having reserved the power to determine the terms and mode of settlement of the Zabriskie claim, and Sargent having, by the subsequent assignment to him, become vested with the same power, was subject to the same liability which would have attached to the bonds in the hands of Underwood, if the assignment to Sargent had not been made.

He could not, therefore, in any event, become a *bona fide* purchaser of the bonds to any greater extent than the value he had in the claim parted with. Sargent could not have supposed he was acquiring any equitable rights of third persons, by his assignment from Underwood or his settlement with Zabriskie, and his position in that respect was not changed or improved thereby.

Sargent must be presumed to have known the law, and that in collecting a non-negotiable chose in action, which he had acquired by assignment from another, he was subject to the liability of being required to satisfy the claims of prior assignees thereof.

He could not acquire an indefeasible right to such a claim by any form of assignment, and in discharging the debtor from his liability thereon he did so subject to his liability to unknown claimants, with equities superior to his own.

We think, therefore, that Sargent did not take the bonds in question as a *bona fide* purchaser, in respect that they were not acquired by him for a valuable consideration or in the ordinary course of business within the spirit and intent of the rule protecting *bona fide* purchasers of negotiable securities.

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While Zabriskie received a valid discharge from his liability upon the claim in suit, because he received it from the apparent owner without notice of any hostile claim, yet, as we have seen, Sargent received the bonds subject to any latent equities existing in third parties to the claim which was discharged, and in that respect did not acquire the character of a *bona fide* holder by the transaction in question.

We are, therefore, of the opinion that the plaintiff is entitled to a new trial.

The judgments of the courts below should be reversed and a new trial ordered with costs to abide the event.

All concur, except DANFORTH, J., not voting.

Judgment reversed.

JOHN KONVALINKA et al., as Executors, etc., Appellants, v.
GEORGE SCHLEGEL, Appellant, and MARIA SCHLEGEL,
Respondent.

104	125
113	236
104	125
144	391

104	125
e172	* 80
172	81
e172	1 82
172	*887

The will of S., who died leaving both real and personal estate, after providing for the payment of his debts and giving certain specific legacies, gave his residuary estate to his executors to sell and dispose of the same and divide the proceeds equally between his "wife and children, share and share alike." *Held*, that the widow was not put to her election, but was entitled to dower in addition to the provision made for her in the will; that the devise to the executors was void as a trust, but valid as a power in trust, and the lands descended to the heirs, subject to the execution of the power, and that the execution of such power was not inconsistent with a dower interest, but a sale would be subject thereto.

Dower is never excluded by a provision for the wife except by express words or necessary implication. Where there are no express words there must be on the face of the will a demonstration of the intent of the testator that the widow shall not take both dower and the provision. Such demonstration is furnished only where there is a clear incompatibility, arising on the face of the will, between a claim of dower and a claim to the benefit of the provision.

The intention to put the widow to an election between dower and the provision may not be inferred from the extent of the provision or because she is devisee for life or in fee, or because it might seem to the court

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unjust as a family arrangement to permit her to claim both, or because it might be inferred that had the attention of the testator been called to it he would have expressly excluded dower.

Savage v. Burnham (17 N. Y. 531) and *Tobias v. Ketcham* (82 id. 819), distinguished.

(Argued December 9, 1886 ; decided January 18, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 9, 1886, which affirmed a judgment, entered upon a decision of the court on trial at Special Term. (Reported below, 39 Hun, 451.)

This action was brought to obtain a judicial construction of the will of George Schlegel, deceased.

The facts, so far as material, are stated in the opinion.

John W. Konvalinka and *Henry McCloskey* for appellants. The entire estate became personalty and vested in the executors in equity, for the purpose of putting them in the possession of a fund to carry out the trust created by the will. (*Lent v. Howard*, 89 N. Y. 177; *Dodge v. Pond*, 23 id. 69; *Stagg v. Jackson*, 1 id. 206; *Moncrief v. Ross*, 50 id. 431; *Meaking v. Cromwell*, 5 id. 136; *Hatch v. Bassett*, 52 id. 359; *Bogert v. Hertell*, 4 Hill, 492; *Graham v. Livingston*, 7 Hun, 11; *Le Fevre v. Toole*, 84 N. Y. 95.) An absolute direction in a will to sell real property if it effects an equitable conversion from the time of the testator's death, shows an intention to dispose of his estate in a manner inconsistent with the widow's right of dower. (*Brink v. Layton*, 2 Redf. R. 79.) If a testator, intending to dispose of his property and making all his arrangements under the impression that he has the power to dispose of all that is the subject of his will, mixes in its disposition property that belongs to another person, or property as to which another person had a right to defeat his dispositions, giving to that person an interest by his will, that person will not be permitted to defeat the disposition when it is in his power and yet take under the will. (*Hawley v. James*, 16 Wend., 62-142; *Willard's Eq.*, 713, 715; *Story's Eq.*,

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§ 1075.) It was not the intention of the testator to give the widow dower, in addition to an equal share with the children in the personalty. (*Dodge v. Dodge*, 31 Barb. 413; 2 Redf. on Wills, 442; *Vernon v. Vernon*, 53 N. Y. 351, 361; *Provost v. Colyer*, 62 id. 585; *Bates v. Hillman*, 43 Barb. 645; *Savage v. Burnham*, 17 N. Y. 577; *Tobias v. Ketcham*, 32 id. 327.) There are only two ways in which the legal estate may be in one and the beneficial interest in another, viz.: by giving a trustee in addition to an absolute and imperative power of sale, either the right to receive the rents and profits or by converting the estate into personalty. (*Cook v. Platt*, 98 N. Y. 35; *Graham v. Livingston*, 7 Hun, 11; *Lent v. Howard*, 89 N. Y. 177.)

W. E. Glover for respondents. The provision of the will as to the residue includes the right to collect the rents and income of the estate and divide the same, until a sale, and is not, therefore, a mere naked power of sale. (*Lent v. Howard*, 89 N. Y. 169.) The shares would not be equal if one of the devisees took, first, one-third and then an equal share with the other devisees. (*Chalmers v. Stovil*, 2 Ves. & Bea. 222; 2 How. Pr. [N. S.] 514; *Cole v. Cole*, 2 id. 516; *Dickson v. Robinson*, 1 S. & St. 513; *Le Fevre v. Toole*, 84 N. Y. 95-102.) This will directs a conversion into cash, and must, therefore, be taken as a disposition of personal property, and is to be regarded at the testator's death *eo instanti* as such. Of this the widow gets an equal share with the children. (*Hatch v. Bassett*, 52 N. Y. 359; *Moncrief v. Ross*, 50 id. 431.)

George Bliss for respondents. The widow is entitled to take both the share in the testator's estate given her under the will and to retain her dower in his real estate. (*Lasher v. Lasher*, 13 Barb. 106; *Church v. Bull*, 2 Denio, 430; *aff'd*, 5 Hill, 206; *Adsit v. Adsit*, 2 Johns. Ch. 448, 452; *Sanford v. Jackson*, 10 Pai. 266; *Tobias v. Ketcham*, 32 N. Y. 319, 325; *Lewis v. Smith*, 9 id. 502, 511, 521; *Vernon*

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v. *Vernon*, 53 id. 351, 362; *In re Zahrt*, 94 id. 605; *Leonard v. Steele*, 4 Barb. 20; *Lasher v. Lasher*, 13 id. 106; *Fuller v. Yates*, 8 Paige, 325, 330; *In re Frazer*, 92 N. Y. 239; *Bull v. Church*, 5 Hill, 206; aff'd, 2 Denio, 430; *Jackson v. Churchill*, 7 Cow. 286; *Havens v. Havens*, 1 Sandf. Ch. 324, 329, 331; *Wood v. Wood*, 5 Paige, 596, 599; *Frazer v. Frazer*, 92 N. Y. 239; *Smith v. Kniskern*, 4 Johns. Ch. 9; *Rathbone v. Dyckman*, 3 Paige, 9; *White v. Kane*, 1 How. [U. S.] 382; *Mills v. Mills*, 28 Barb. 454; *Dawson v. Bell*, 1 Keen, 761, 764; *Bending v. Bending*, 3 Kay & J. 257.) The mere amount of provision for a widow does not show an intent to put her to her election. (*Lewis v. Smith*, 9 N. Y. 511; *Havens v. Havens*, 1 Sandf. Ch. 324-329; *Frazer v. Frazer*, 92 N. Y. 239.) Inasmuch as a testator cannot in law control the sale of his wife's estate as tenant in dower, a general direction to sell must be held to apply only to that interest in the estate which he can control. (*Lewis v. Smith*, 9 N. Y. 502; *In re Frazer*, 92 id. 239; *Harrison v. Harrison*, 1 Keen, 768; *Foster v. Cook*, 3 Bro. C. C. 347; *Gibson v. Gibson*, 17 Eng. L. & Eq. 349.) A devise of lands to trustees to sell, or a direction to the executors to sell is understood to pass the estate subject to dower. (*Adsit v. Adsit*, 2 Johns. Ch. 451; *Wood v. Wood*, 5 Paige, 596, 601; *Lewis v. Smith*, 9 N. Y. 502, 511; *Bull v. Church*, 5 Hill, 207; *In re Frazer*, 92 N. Y. 239; *Gibson v. Gibson*, 17 Eng. L. & Eq. 353; *Harrison v. Harrison*, 1 Keen, 768.) A mere power of sale does not create a trust estate, and to bar dower there must be not only a trust, but a trust inconsistent with the claim of dower. (*Wood v. Wood*, 5 Paige, 596, 601; *In re Frazer*, 92 N. Y. 239; *Vernon v. Vernon*, 53 id. 632; *Williams v. Freeman*, 98 id. 577; *Ellis v. Lewis*, 3 Hare, 310; *Bending v. Bending*, 3 Kay & J. 57.)

ANDREWS, J. The question is, whether the widow of the testator is put to her election between dower and the provision in the will.

The estate of the testator consisted of both real and per-

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sonal property. The will, after directing the payment of the testator's debts and funeral expenses, and after giving to his wife the bed-room furniture in his dwelling-house, and to his children the rest of the furniture therein, proceeds as follows: "All the rest, residue and remainder of my estate, property and effects of every nature, kind and description, I give, devise and bequeath to my executors and executrix hereinafter named, and I authorize and direct them to sell and dispose of the same at such time and on such terms as to them shall seem best, and to divide the proceeds thereof equally among my wife and children, share and share alike."

There can be no controversy as to the general principles governing the question of election between dower and a provision for the widow in the will. Dower is favored. It is never excluded by a provision for a wife, except by express words or by necessary implication. Where there are no express words there must be upon the face of the will a demonstration of the intention of the testator that the widow shall not take both dower and the provision. The will furnishes this demonstration only when it clearly appears without ambiguity or doubt, that to permit the widow to claim both dower and the provision would interfere with the other dispositions and disturb the scheme of the testator, as manifested by his will. The intention of the testator to put the widow to an election cannot be inferred from the extent of the provision, or because she is a devisee under the will for life or in fee, or because it may seem to the court that to permit the widow to claim both the provision and dower would be unjust as a family arrangement, or even because it may be inferred or believed, in view of all the circumstances, that if the attention of the testator had been drawn to the subject he would have expressly excluded dower. We repeat, the only sufficient and adequate demonstration which, in the absence of express words, will put the widow to her election, is a clear incompatibility, arising on the face of the will, between a claim of dower and a claim to the benefit given by the will. We cite a few of the cases in this State showing

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the general principle and the wide range of application. (*Adsit v. Adsit*, 2 J. Ch. 449; *Sanford v. Jackson*, 10 Paige, 266; *Church v. Bull*, 2 Den. 430; *Lewis v. Smith*, 9 N. Y. 502; *Fuller v. Yates*, 8 Paige, 325; *Havens v. Havens*, 1 Sand. Ch. 324, 331; *Wood v. Wood*, 5 Paige, 596.)

In view of these settled rules, we think the widow in this case was not put to her election. The devise to the executors was void as a trust, but valid as a power in trust, for the sale of the lands and a division of the proceeds, and the lands descended to the heirs of the testator, subject to the execution of the power. (1 Rev. Stat. p. 729, § 56; *Cooke v. Platt*, 98 N. Y. 35.) It is strenuously urged that the power of sale being peremptory, worked an equitable conversion of the lands into personalty, as of the time of the testator's death, and created a trust in the executors in the proceeds for the purpose of distribution, which trust, it is alleged, is inconsistent with a claim of dower. The doctrine of equitable conversion, as the phrase implies, is a fiction of equity which is frequently applied to solve questions as to the validity of trusts; to determine the legal character of the interests of beneficiaries; the devolution of property as between real and personal representatives, and for other purposes. It seems to be supposed that there is a necessary repugnancy between the existence of a trust in real property created by a will, and an outstanding dower interest of a widow in the trust property. We perceive no foundation for this contention. If the purposes of a trust, as declared, require that the entire title, free from the dower interest of the widow, should be vested in the trustees in order to effectuate the purposes of the testator in creating it, a clear case for an election is presented. (*Vernon v. Vernon*, 53 N. Y. 351.) But the mere creation of a trust for the sale of real property and its distribution, is not inconsistent with the existence of a dower interest in the same property. There is no legal difficulty in the trustee executing the power of sale, but the sale will necessarily be subject to the widow's right of dower, as it would be subject to any outstanding interest in a third person, paramount to

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that of the trustee. In the cases of *Savage v. Burnham* (17 N. Y. 561), and *Tobias v. Ketcham* (32 id. 319), the widow was put to her election, not because the vesting of the title in trustees was *per se* inconsistent with a claim for dower, but for the reason that the will made a disposition of the income, and contained other provisions which would be in part defeated if dower was insisted upon. There is language in the latter case, which, disconnected with the context, may give color to the contention of the appellant. But it is the principle upon which adjudged cases proceed, which is mainly to be looked to, because a correct principle is sometimes misapplied. There is, however, no ground for misapprehension of the meaning of the learned judge in that case, interpreting his language with reference to facts then under consideration. It has frequently been declared that powers of, or in trust for sale, are not inconsistent with the widow's right of dower. (*Gibson v. Gibson*, 17 Eng. L. and Eq. 349; *Bending v. Bending*, 3 Kay & J. 257; *Adsit v. Adsit*, *supra*; *In re Frazer*, 92 N. Y. 239.) And it was held in *Wood v. Wood* (5 Paige, 596), that the widow was not put to her election where the testator devised all his property to trustees with a peremptory power of sale, and directed the payment to the widow of an annuity out of the converted fund. The same conclusion was reached under very similar circumstances in *Fuller v. Yates* (8 Paige, 325), and *In re Frazer* (*supra*), the widow's dower was held not to be excluded by a provision in the will, although as to a portion of the realty the power of sale given to the executors was peremptory. The general doctrine is very clearly stated by the vice-chancellor in *Ellis v. Lewis* (3 Hare, 310): "I take the law to be clearly settled at this day, that a devise of lands *eo nomine* upon trusts for sale, or a devise of lands *eo nomine* to a devisee beneficially, does not *per se* express an intention to devise the lands otherwise than subject to its legal incidents, dower included." This remark of the vice-chancellor also answers the claim that the testator, when he described as the subject of the dower, "all the rest, residue and remainder of my estate," meant the entire title, or the estate as enjoyed by

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him. A similar argument was answered by Lord THURLOW in *Foster v. Cook* (3 Bro. Ch. C. 347). "Because," he said, "the testator gives all his property to the trustees, I am to gather from his having given all he has, that he has given that which he has not." The argument that the testator intended equality of division between his wife and children is also answered by the same consideration. The proceeds of the testator's estate were, by the will, to be equally distributed. It left untouched the dower of the widow, which he could not sell or authorize to be sold, and which was a legal right not derived from him and paramount to all others. It may be conjectured, perhaps reasonably inferred, that the testator really intended the provision for his wife to be exclusive of any other interest, but so it is not written in the will, and we are not permitted to yield any force to the suggestion. It is a question of legal interpretation which has been settled.

The judgment should, therefore, be affirmed.

All concur.

Judgment affirmed.

NICHOLAS F. PALMER, as Executor, etc., Appellant, v. GEORGE A. MORRISON, Respondent.

In an action to compel the specific performance, on the part of the vendee, of a contract for the sale of lands, plaintiff claimed title under a deed from an assignee in bankruptcy. It appeared that in 1842 the then owner of the land was adjudged a bankrupt, and the official general assignee in bankruptcy became vested with the title; no debts were proved against the estate of the bankrupt before his discharge and but one small one thereafter. In 1844 the assignee advertised and sold the land at auction and it was bid off by one R. for \$2. In 1866, T. claiming to have purchased the bid of R. from his administratrix, applied for and obtained a deed from the assignee which was recorded in 1869. No possession accompanied the title under the assignee's sale. *Held*, that the title was defective and defendant could not be compelled to complete the purchase; that if there was a binding contract for the sale of the land by the assignee to R., the administratrix of the latter had no interest in the land, as the interest of her intestate was real

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estate and went to his heirs; and that, therefore, she conveyed no right or interest by her assignment, and the assignee in bankruptcy had no authority to convey to T.

As to whether under the late bankrupt act a sale by an assignee in bankruptcy of the real estate of a bankrupt, made without an order of the bankruptcy court directing it, is void or not, *quære*.

The case of *Smith v. Long* (12 Abb [N. C.] 113), holding such a sale to be void, explained and the question stated to be still an open one.

(Submitted December 9, 1886, decided January 18, 1887.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York entered upon an order made February 4, 1885, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term. (Mem. of decision below, 19 J. & S. 530.)

The nature of the action and the material facts are stated the opinion.

William Man for appellant. The property of the bankrupt, by the express provision of the act, passes to the assignee and vests in him without the need of any further or other conveyance or assurance by the bankrupt or otherwise. (Act of 1841, 5 U. S. Stat. at Large, 443, § 3.) To get back his property the assignor would have to petition the court to direct the assignee to reconvey. (*Paige v. Waring*, 76 N. Y. 465; *Stevens v. Earles*, 25 Mich. R. 40.) The administratrix of Reed was the proper party to assign a mere bid. It was not a contract for real estate, which is in itself real estate. At an auction sale the title does not pass by the bid accepted, nor by the written memorandum made by the auctioneer, but only by the deed. (Bing. on Sales of Real Prop. 57; *Simmons v. Catlin*, 2 Cal. Rep. 61.) It was competent for Congress to enact section 15 of the Bankrupt Act. They might say that the deed in the prescribed form should be presumptive evidence only of regularity, as our State legislature has done in regard to the sales of land in the State for taxes. (2 R. S. [7th ed.] 1028, § 65; *Coleman v. Shattuck*, 62 N. Y. 348.)

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George A. Strong for a party similarly situated with the appellant. The assignee's deed, with the accompanying proof specified in the statute, is conclusive as to the validity of the sale. (Act of 1841, 5 U. S. Stat. at Large, 440; *Holbrook v. Brennen*, 31 Ill. 512; *Holbrook v. Coney*, 25 id. 551; *Joy v. Berdell*, id. 542; *Durnel v. Perley*, 32 Me. 202, 203; *Harrington v. Fish*, 10 Mich. 421.) The sale by an assignee in bankruptcy is a judicial sale. (*Stevens v. Hauser*, 39 N. Y. 306.) A title acquired under a judicial sale cannot be impeached by showing errors or illegalities in the proceedings of the court which rendered the judgment, even though these have since brought about a reversal. (*Holden v. Sackett*, 12 Abb. Pr. 475; *Hening v. Punnett*, 4 Daly, 545; 2 R. S. [Edm. ed.], 382, 383, § 3440.) Under the Bankrupt Act of 1841, a special order of sale in each instance was not indispensable, nor if such order was obtained in any given case, was it essential that it should fix the time and manner of that particular sale, so long as general rules existed in relation to these matters. (*Holbrook v. Coney*, 25 Ill. 549; *Holbrook v. Brennen*, 31 id. 513; *In re Mott*, 6 Fed. Rep. 688; *People v. Supervisors*, 34 N. Y. 272; 8 id. 328; *Striker v. Kelly*, 7 Hill, 24; *People v. Holley*, 12 Wend. 481; *Rex v. Birmingham*, 8 B. & C. 35; *Cole v. Green*, 6 Man. & G. 890; *King v. St. Gregory*, 2 Ad. & Ell. 99.) Even if the court should be of opinion that the act of 1841 requires a special order of sale in each particular case, prescribing the time and manner of sale, nevertheless the failure to make such an order, or the failure in the order actually made to prescribe such time and manner cannot suffice to defeat a sale actually made when afterwards assailed collaterally. (*Chemung Bk. v. Judson*, 8 N. Y. 260, 263; *In re Mott*, 6 Fed. Rep. 688; *Stevens v. Hauser*, 39 N. Y. 306, 312; 1 Robt. 50, 51; *Stevens v. Palmer*, 10 Bosw. 61, 63, 64; *People v. Sturtevant*, 9 N. Y. 263; *Swift v. Poughkeepsie*, 37 id. 512; *Schaettler v. Gardinier*, 47 id. 406; *Roderigas v. East River Sogs Inst'n.*, 63 id. 462; *Hunt v. Hunt*, 72 id. 228; *Elliot v. Perisol*, 1 Peters. 340; *Voorhees v. Bk. of U. S.*, 10 id. 477.)

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John M. Bowers for respondent. The authority of the assignee to sell is statutory, and the principle applies that such authority must be strictly pursued. (*Hilliard on Bank. and Insol.*, 170; *Cleveland v. Boerum*, 27 Barb. 252, 254; *Smith v. Long*, 3 Civ. Pro. 396, 408 [12 Abb. N. C. 113]; *Gray v. Heslep*, 33 Mo. 238, 244; *Osborn v. Baxter*, 4 Cush. 406.) At the time of the sale to Reid the estate of the assignee had been divested by virtue of the discharge of the bankrupt without any debts having been proven against him. (*Page v. Waring*, 76 N. Y. 463, 473; *Charman v. Charman*, 14 Ves. 579; *In re Hoyt*, 3 Bank R. 55, 56; *Manice v. Manice*, 43 N. Y. 303; *Selden v. Vermilyea*, 3 id. 525, 532; *Peck v. Brown*, 2 Rob. 119, 133; *Ford v. Belmont*, 7 id. 98; *Young v. Bradley*, 101 U. S. 782, 787; *Poor v. Concidine*, 6 Wall. 458; *French v. Edwards*, 21 id. 147; *Lincoln v. French*, 105 U. S. 614; *Perry on Trusts*, §§ 351, 352, 920; *Tiffany & Bullard's Law of Trusts and Trustees*, 861, 862; *Umlin's Office of Trustees*, 156, 227; *Hill on Trustees*, 392, 398, 1 R. S. 730, § 67.) The recital in the deed of the assignment of the bid in such a case is no proof of the fact. (*Cleveland v. Boerum*, 27 Barb. 252, 254.) Plaintiff should have sued individually, not in his representative capacity. (*Thompson v. Whitmarsh*, 100 N. Y. 35.) The purchaser has the right to a good title, and cannot be compelled to accept a conveyance, which leaves him to the uncertainty of a doubtful title, or to any hazard or to a contest with other parties concerning the same. (*Jordan v. Poillon*, 77 N. Y. 518.)

EARL, J. This action was brought to enforce the specific performance of a contract for the sale of land by the vendor against the vendee. The vendee defends on the ground that the plaintiff is not able to give such a title to the land as he has the right to demand and receive.

The material facts are as follows: In the year 1842, and prior thereto, the land was owned in fee simple by one Harts-horn, then a resident of this State, who in December of that year was, upon his own application, adjudged a bankrupt be

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the United States District Court for the Southern District of New York, pursuant to the Bankrupt Act of 1841. He obtained his final discharge from his debts in 1843, and prior thereto no debts had been proved against his estate. But after his discharge, in May, 1843, a debt of \$194 was proved, and that was the only one, so far as the record discloses, that was proved. William C. H. Waddell was the official general assignee in bankruptcy for the southern district of New York, and as such became vested with the title to the land. On the 22d of March, 1844, he made a report recommending a sale of the land, and thereafter he advertised it for sale, and on the 7th of May, 1844, it was sold at auction and bid off by one Reed for the price of \$2. John Townshend, claiming to have purchased the bid from the administratrix of Reed, in 1866, applied to Waddell for a deed of the land, and on the 14th of September, 1866, Waddell executed a deed to him, which was placed upon record on the 2d of October, 1869. In 1871 Townshend conveyed the land to one Van Schoeneng, who, in 1874, mortgaged the same to Francis B. Hegeman. That mortgage was subsequently foreclosed and the land was bid off by and conveyed to Mrs. Hegeman, and the plaintiff, under a power of sale contained in her will, entered into the contract of sale to the defendant.

The courts below held that the plaintiff was not able to convey a good title to the land and based their decision upon the case of *Smith v. Long* (12 Abb. [N. C.] 113), in which it is claimed this court decided that under the bankrupt law of 1841 an assignee in bankruptcy had no power to dispose of the real estate of the bankrupt, except in pursuance of an order of the bankrupt court fixing the time and manner of such sale, and that if there was no such order the omission was jurisdictional and the sale void under section 9 of the bankrupt act, which required that all sales, transfers and other conveyances of the assignee of the bankrupt's property should be made at such time, and in such manner, as should be ordered and appointed by the court in bankruptcy. Here there was no order of any kind of the bankrupt court directing the sale.

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It is strenuously contended on behalf of the plaintiff now, as it was in the case of *Smith v. Long*, that the absence of the order, even if irregular, did not render the sale and the deed given in pursuance thereof absolutely void. It is claimed that a very large amount of real estate in the city of New York is held under deeds executed by Waddell as assignee in pursuance of sales made in the same way without any order of the bankrupt court, and that it would unsettle many titles now to hold that the deeds of the assignee under such circumstances were void.

It is proper to say in reference to the case of *Smith v. Long* that after it was decided a motion for reargument was made and that motion was never decided for the reason that the case was settled, and the opinion was therefore withheld from publication in the reports of this court. There were two grounds stated in the opinion for the reversal of the judgment in that case, and the decision can rest upon the one ground that the grantee of the land there in question had no right under the Code to commence and maintain his action in the name of his remote grantor; and, under the circumstances, the last ground stated in the opinion for the reversal of the judgment, to wit, that the sale and deed were void because there was no order of the court fixing the time and manner of the sale, should still be regarded as an open question in this court. It was not necessary to decide it in that case and it was not finally determined. There is some dispute both upon reason and authority whether the order was a necessary prerequisite to the validity of a sale and deed under the bankrupt act, and the able judge who wrote the opinion in *Smith v. Long* reached the conclusion that it was; and whether it was or not should not be determined in this case in the absence of the bankrupt or his heirs, who would not be bound by any decision which might be made in the litigation between these parties.

But there are other grounds for the affirmance of this judgment. These facts standing alone, to wit: that no debts were proved against the estate of the bankrupt before his discharge, and but one small debt afterward; that the land was sold by

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the assignee for but two dollars without any proof even that that was paid or that any binding contract for the sale was made; that no deed was given by the assignee until after the lapse of twenty-two years when no conveyance could have been compelled, and that the deed was then given without any order of the court, and that no possession ever accompanied the title under the assignee's sale, leave plaintiff's title involved in so much infirmity and uncertainty that any court could well decline to compel a vendee entitled to a good marketable title to take a conveyance thereof. (Fry on Spec. Perf. [3d Am. ed.] 427.)

But there is still a surer and more satisfactory ground upon which to deny the relief the plaintiff seeks. If there was a binding contract for the sale of the land by the assignee to Reed, and Reed died and his administratrix assigned his contract of purchase to Townshend (of which facts there is no proof) then Townshend obtained no right from the administratrix. She had no interest in the contract or the land and no right to deal with or sell the same. Reed's interest under the contract was real estate, and at his death passed as such to his heirs and not to his administratrix, and his heirs alone were authorized to assign and convey such interest. (*Boon v Chiles*, 10 Pet. 177, 180; *Simonds v. Catlin*, 2 Caines R. 61, *Hathaway v. Payne*, 34 N. Y. 92, 103; *Stoddard v. Whiting*, 46 id. 627.) Waddell therefore had no authority to convey to Townshend, and the rights of Reed's heirs, if by his death they acquired any in the land, appear to be still intact. The deed was not made in pursuance of any public sale and was wholly unauthorized by law.

The judgment should, therefore, be affirmed with costs.

All concur.

Judgment affirmed.

Statement of case.

SILAS D. GIFFORD, as Receiver, etc., Respondent, v. THE FATHER MATTHEW TOTAL ABSTINENCE BENEFIT SOCIETY, No. 1, of Tuckahoe, N. Y., WILLIAM P. O'CONNOR, Executor, etc., Appellant.

A grantee, who is in undisturbed possession and enjoyment of the premises conveyed to him, may not retain that possession and at the same time withhold the purchase-price; and where by his deed he has assumed and agreed to pay a mortgage on the premises, he cannot while holding possession avoid the obligation of his covenant on the ground that the deed is invalid.

(Argued December 9, 1886; decided January 18, 1887.)

APPEAL by defendant, William P. O'Connor, executor of John McEvoy, deceased, from a judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made December 15, 1885, which affirmed, so far as appealed from, a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term. (Reported below, 38 Hun, 350.)

This action was brought to foreclose a mortgage executed by defendant, The Father Matthew Total Abstinence Benefit Society.

The appellant was sought to be charged with any deficiency arising on sale because of a covenant in a deed of the premises from the mortgagor to his testator, by which the latter assumed and agreed to pay the mortgage. The defense was that the deed from the society was imperfect and invalid. The testator was put in possession. He subsequently conveyed the premises. It did not appear that his grantee had ever been evicted, or that he still remained in possession. The appeal was from so much of the judgment of foreclosure as ordered a judgment against the appellant for any deficiency.

T. G. Barry for appellant. Corporations have no inherent power to reduce the number of their trustees. The number is fixed by the act or certificate of incorporation, and can only be changed by statute. (*Trustees of Vernon Society v. Hill*,

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6 Cow. 23; *People v. Runkel*, 9 Johns. 147; *Moore v. Rector, etc., of St. Thomas*, 21 Abb. [N. C.] 51.) A resolution passed at a general meeting of the corporators is not the act of the trustees, though a majority of the trustees be present and concur. (*Cammeyer v. United German Lutheran Church*, 46 N. Y. 131; 2 Sand. Ch., 186.) The court never acquired jurisdiction to make the order for the conveyance. *Baptist Church case (supra.)* Without an order any sale made by a religious society is void. (*Manning v. Moscow Presby. Society*, 27 Barb. 52.) No title having passed under the deed to John McEvoy there was no consideration for the alleged covenant of assumption. (*Crowe v. Lewin*, 95 N. Y. 423; *Judson v. Dada*, 79 id. 379.) In an action to foreclose the mortgage, a grantee of the mortgaged premises who has assumed the mortgage is not estopped, so long as he or his grantees are not evicted, from defending against liability under the covenant of assumption. (*Parkinson v. Sherman*, 74 N. Y. 88; *Waldron v. McCarty*, 3 John, 471; *Kerr v. Shaw*, 13 id. 236; *St. John v. Palmer*, 5 Hill, 599; *Simis v. Salters*, 3 Duer, 214; *Withers v. Morrill*, 3 Edw. Ch. 560.) A mortgagee who seeks to avail himself of an assumption clause in a subsequent deed of the premises, takes through and under the grantor, and is subject to defenses arising out of the contract or transaction between the parties to the deed. (*Flagg v. Munger*, 9 N. Y. 483; *Dunning v. Leavitt*, 85 id. 30; *Fox v. Heath*, 16 Abb. Pr., 162; *Baptist Church case [supra]*; *Clute v. Jones*, 28 N. Y. 280; *Albany Savings Inst. v. Burdick*, 87 id. 40; *Dey Ermand, v. Chamberlain*, 88 id. 658; *Kelly v. Geer*, 101 id. 664; *Vrooman v. Turner*, 69 id. 280.) A purchaser who, by a valid instrument, for a good consideration has assumed the payment of a mortgage, is personally liable for any deficiency. (*Lawrence v. Fox*, 20 N. Y. 268; *Garnsey v. Rogers*, 47 id. 233, 236, 239; *Judson v. Dada*, 79 id. 379; *Dunning v. Leavitt, supra.*)

Ralph E. Prime for respondent. The deed having been recorded in the proper office, a presumption of delivery and

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acceptance arises, and it is inferred in law that it was duly delivered and accepted. (*Lawrence v. Farley*, 24 Hun, 293; *Knolls v. Barnhart*, 71 N. Y. 478; *Fisher v. Hall*, 41 id. 423; *Robinson v. Wheeler*, 25 id. 260; *Jackson v. Perkins*, 2 Wend. 308; *Gilbert v. N. A. Fire Ins. Co.*, 23 id. 46; *Frayser v. Rockefeller*, 63 N. Y. 273; *Jackson v. Bodle*, 20 Johns. 184; *Spencer v. Carr*, 45 N. Y. 440.) The attempt to impeach the title conveyed, by an attack upon the right of the mortgagor to convey to McEvoy, was not material or relevant. (*Parkinson v. Sherman*, 74 N. Y. 88; *Parkinson v. Jacobson*, 13 Hun, 318; *Curtis v. Burr*, 39 Barb. 661; *Abbot v. Allen*, 2 Johns. Ch. 519; *Bumpus v. Platner*, 1 id. 213.) The grantee in a deed has no remedy for a failure of title against his grantor, in absence of fraud or mistake except upon covenants in his deed, and when he has no covenants he has no remedy. (*Thorp v. Keokuk Coal Co.*, 48 N. Y. 256.) The validity of the order authorizing the conveyance to McEvoy cannot be questioned by the appellant who was not a party to the proceeding, nor indeed can it in any event be questioned collaterally or in a collateral proceeding. (*Porter v. Purdy*, 29 N. Y. 110, 113; *Rusher v. Sherman*, 28 Barb. 416; *Morrill v. Dennison*, 8 Abb. 401; *Roderigas v. E. R. Sav. Inst.*, 63 N. Y. 460; *Miller v. Brinckerhoff*, 4 Denio, 118; *Slater v. Fairchild*, 3 N. Y. 41; *Skeinnion v. Kelly*, 18 id. 355; *Arnold v. Nichols*, 64 id. 117; *Pike v. Seiter*, 15 Hun, 402; *Clafin v. Ostrom*, 54 N. Y. 581; *Campbell v. Smith*, 71 id. 28; *Green v. Fry*, 93 id. 353.)

FINCH, J. The question presented on this appeal is not an open one. Granting for the sake of the argument, what is by no means certain, that the title conveyed to McEvoy by the corporate deed was imperfect and invalid, it does not follow that while as grantee he remains in the undisturbed possession and enjoyment of the premises he can retain that possession and at the same time withhold the purchase-price and so keep the fruit of his contract while repudiating its obligation. By the terms of the deed which he accepted

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the mortgage debt was in substance the purchase-money which he agreed to pay directly to the mortgagee for the relief and discharge of the mortgagor. The force of the covenant left him practically in the same situation as if he had given back a purchase-money mortgage with a bond or covenant to pay the debt directly to his grantors, and while retaining his possession and undisturbed therein, was resisting, if not the foreclosure, at least a judgment upon his covenant. That cannot be done. (*Parkinson v. Sherman*, 74 N. Y. 88.) That case covers broadly all that is involved in this. There an action was brought to foreclose a mortgage which the grantee of the mortgagor had assumed and agreed to pay, and judgment was sought for a deficiency against such grantee. The answer averred that the title made to the grantee was utterly invalid, and at the date of the deed was in a third person who remained the owner. The court held that, inasmuch as the grantee was presumably in possession and alleged no eviction, and made no offer of surrender as a basis for equitable relief, the failure of title furnished no defense either to the mortgage or the covenant to assume and pay it. The case is decisive against the defense here interposed. The defendant, McEvoy, was shown affirmatively to have been put in possession and to have afterward conveyed to McCloskey. There is no allegation of an eviction or pretense that the possession has been disturbed. The corporate grantor has disbanded, leaving a future assertion of title in it extremely improbable, but if that should occur and prove successful, which is hardly to be anticipated, I think equity would not be powerless if McEvoy should pay the deficiency, by a revival of the mortgage to that extent, or some process of subrogation, to furnish proper and adequate relief. But in view of the foreclosure and the passing of the title under the mortgage, the validity of which nobody disputes, any action by the disbanded corporation is improbable and almost absurd. If the grantee should be called upon by the corporation to account for the rents and profits received I have no doubt that a recovery could be limited to those received in excess of the deficiency

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paid. But, be that as it may, there is no doubt of the rule which excludes the defense attempted. In *Dunning v. Leavitt* (85 N. Y. 30) there was an eviction, and so a total failure of consideration for the covenant of assumption. In *Crowe v. Lewin* (95 N. Y. 423) there was a mistake of fact which invalidated the entire contract and carried down with it the assumption agreement. The cases finally cited, of which *Albany City Savings Inst. v. Burdick* (87 N. Y. 40), is a type, concern only the question whether any contract of assumption was ever in fact made. The effort of the appellant to escape the operation of the rule invoked, by treating the contract of assumption as independent of the consideration of the grant and outside of the contract of sale, and so within the principle of *U. A. Baptist Church v. Baptist Church in O Street* (46 N. Y. 131, 139) cannot be sustained. By the terms of the accepted deed the assumption of the mortgage was itself the substantial consideration of the grant.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.

HARRIET S. FERDON et al., as Executors, etc., Appellants, v.
HENRY W. CANFIELD, Respondent.

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145 580

A policy of insurance, issued on the Tontine plan, on the life of S, recited that it was issued in consideration of a sum stated to have been paid by C. and six others named, the children of S. who were declared to be the assured; to whom the company agreed to pay the amount of assurance upon the death of the insured, or that in case he should be living at the time of the maturity of the policy, the holder or holders of the policy should be entitled to withdraw in cash the policy's share of the fund. In an action to determine as to who was entitled to this share, plaintiffs claimed under an assignment of the policy from S. to their testator, and defendant under assignments from the assured. *Held*, that plaintiffs acquired no right to the policy or the fund under the assignment from S., as the contract of the company was not with him, but by its express terms with the assured.

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Plaintiffs claimed that the assignments to defendant were in some respects invalid. *Held*, that conceding this to be so, it was immaterial; it did not improve plaintiffs' title or authorize them to recover.

(Argued December 10, 1886; decided January 18, 1887.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made March 8, 1886, which reversed a judgment in favor of plaintiffs, entered upon a decision of the court on trial at Special Term, and granted a new trial. (Reported below, 39 Hun, 571.)

This action was in the nature of an action of interpleader, brought originally by the Equitable Assurance Society of the United States to determine the title to a fund in its hands, belonging to the owners of a policy of insurance, issued by it on the life of Samuel W. Canfield, which was claimed by the present plaintiffs and the defendant.

By an order of the court the fund was paid into court, and plaintiffs were substituted in the place of the original plaintiff.

The material facts are stated in the opinion.

Andrew Fallon for appellants. The policy in suit was duly assigned by the insured while it was in his possession, to John W. Ferdon, for a valuable consideration. (*St. John v. Am. Mut. L. Ins. Co.*, 13 N. Y. 31.) John W. Ferdon was entitled to receive the moneys due upon the policy to the extent of the amount due to the insured. (*Volton v. Nat. Fund L. As. Co.*, 20 N. Y. 32; *Olmstead v. Keyes*, 85 id. 593, 598, 599.) As long as Samuel W. Canfield retained the policy in his possession, he might control it as his own. (*Lemon v. Phenix Ins. Co.*, 38 Conn. 294; *Bickerton v. Jaques*, 12 Abb. [N. C.] 25; *Clarke v. Durand*, 12 Wis. 223; *Universal L. Ins. v. Cogbill*, 30 Gratt. 72; *Foster v. Gile*, 50 Wis. 603.)

Oscar Frisbie for respondent. The assured were the only persons who could assign the policy in suit. (*Rupert v. Union Mut. Ins. Co.*, 7 Robt. 155; *Gold v. Emerson*, 99 Mass. 154; *Eddie v. Slimman*, 26 N. Y. 9; 34 Conn. 35;

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Ins. Co., v. Applegate, 7 Ohio St., 292.) Samuel W. Canfield could not make an assignment of the policy at the time it is claimed he attempted to, for the reason that he did not own it, and it is not shown that he had any delegated power. The title to the policy was in the assured, his children. (*Rupert v. Union Mut. Ins. Co.*, 7 Robt. 155; *Olmstead v. Keyes*, 85 N. Y. 593, 601.) The assignment put in evidence by the plaintiffs vested no title in John W. Fardon, deceased, and, therefore, none in his legal representatives. Hence the plaintiffs have failed to prove an assignment. (*Brunner v. Cohn*, 13 Week. Dig. 1.) Assuming S. W. Canfield had a right to dispose of the policy, it must be presumed, in the absence of any proof on the subject, that he was to dispose of it for the benefit of the assured, not for his own. He was a trustee for their benefit. (85 N. Y. 593; *Harrington v. Erie Co. Sav'gs Bk.*, 23 Week. Dig. 38; *Dodge v. Stevens*, 94 N. Y. 209; *Robinson v. Chem. Nat. Bk.*, 86 id. 404.) A policy of the character of the one involved in this action is in its nature testamentary, and so if it remains unchanged beyond the period of its limitation it is irrevocable. (5 Ins. L. J. 305.) The words "the insured" in the covenant to pay contained in a life policy, mean for him whose benefit the insurance is made, rather than him on whose life it depends. (*Hogle v. Guard L. Ins. Co.*, 4 Abb. Pr. [N. S.] 346.)

RAPALLO, J. Although the life of Samuel W. Canfield was the life insured by the policy, he was not the party assured thereby. His life was the subject of insurance but the contract does not, on its face purport to have been made either with him or for his benefit, nor does he appear to have had any interest therein which he could assign. The policy recites that in consideration of the representations made in the application therefor and of the sum of \$1,925, payable in advance by Catharine E. Canfield and six others, children of the said Samuel W. Canfield, who are expressly declared to be the assured, and of the semi-annual payment of a like premium,

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the society assures the life of the said Samuel W. Canfield in the amount of \$25,000 and promises to pay the amount of said assurance to the said seven named children in equal shares in sixty days after due notice and satisfactory proof of the death of said person whose life is assured.

Under this contract it is impossible to see how any assignment by the person whose life is insured can affect the rights of the parties to whom the amount of insurance is by the terms of the policy made payable, and who are therein declared to be the parties by whom the premiums are payable, and to be the parties assured.

The plaintiffs claim under an assignment of this policy made by Samuel W. Canfield to their testator as collateral security for money loaned by him to Canfield, and the defendant claims under an assignment of the same policy from the children, who are therein described as the assured. No facts appear, either in the findings or the evidence, disclosing any equities on the part of the plaintiffs outside of the title claimed by them under the assignment by Samuel W. Canfield to their testator, and we are unable to perceive any foundation for their claim. The contract of the Equitable Assurance Society was not with Samuel W. Canfield, but by its express terms was with the assured, viz., his children.

The claim is made in the points of the counsel for the appellants, that by the terms and conditions of the policy, (which was on the Tontine plan) in case Samuel W. Canfield should be living at the time of the maturity of the policy, the amount due was payable to him personally.

We are unable to find anything to that effect. The provision as to payment before death was, that upon the completion of the Tontine period, the legal holder, or holders of the policy should be entitled, at their option, to withdraw in cash the policy's share of the fund. The only provision under which it could be claimed that Samuel W. Canfield might in any event be entitled to draw anything, is a subordinate one, to the effect that the legal holder or holders of the policy on the completion of the Tontine period, might, at their election,

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instead of withdrawing their share of the Tontine fund, continue the assurance for the original amount and apply their entire Tontine dividend to the purchase of an annuity to reduce the future premiums, and that if in any year the amount derived from such annuity, together with the annual dividend on the policy, should exceed the amount of premium due, the excess should be paid in cash to the said Samuel W. Canfield or assigns. It can easily be surmised how the name of Samuel W. Canfield, instead of the assured, happened to be inserted in this clause, but it is quite unimportant to consider that matter, inasmuch as the contingency provided for never occurred.

The counsel for the appellants also claim that the alleged assignments from the assured to the defendant in this action, were incomplete, and in some respects invalid. But these objections, if well founded, do not help the case of the plaintiffs. If the defendant has not a valid assignment of the interests of the assured, the fund belongs to them, but this does not improve the plaintiffs' title.

The order of the General Term should be affirmed and judgment absolute rendered against the plaintiffs on their stipulation, with costs.

All concur.

Judgment accordingly.

104	147
137	254
104	147
145	176

HARRIET A. BRADY et al., Executors, etc., Respondents, v.
PATRICK CASSIDY et al., Appellants.

Plaintiffs, whose testator had carried on a manufacturing business, sold to defendants the "plant," and leased to them the buildings in which the business had been carried, and after the lessees had taken possession, sold and executed to them a bill of sale of "the entire manufactured stock, * * * now on hand at foundry and store-rooms," which were part of the premises so leased. Plaintiffs immediately began an inventory of the property, which when completed was delivered to defendants. A large amount, consisting proportionally of the more valuable part of the goods which had appeared in and was exhibited as part of the stock at the time of the sale, was omitted from the inventory,

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and it appeared had been delivered by plaintiffs to other parties, after the day of sale, upon orders received by them previous to that time, but as to which there had been no valid agreement of sale. In an action to recover the contract-price for the goods delivered, defendants set up as a counter-claim damages for the removal of the said goods. The court on the trial left it to the jury to determine what the parties meant by the "stock on hand" in the bill of sale, and charged that there was some part of the stock plaintiffs did not own at the time of the sale. *Held*, error; that as plaintiffs failed to show a contract, which, as between themselves and the alleged purchasers of the goods so taken from the stock, transferred the title of the property, plaintiffs remained the legal owners and entitled to dispose of it to defendants; and, as the property was on the premises occupied by defendants, the execution of the bill of sale passed the title to them; that assuming a valid executory contract of sale had been made by plaintiffs prior to the sale to defendants, the purchaser acquired no title to any specific property, and on the refusal of the vendors to fill the orders had simply a right of action for damages, and that it was the undoubted right of defendants to have the meaning and intent of their contract determined by the court.

When the terms and language of a contract are ascertained, in the absence of technical phrases, or of terms, the meaning of which is obscure, or of latent ambiguities, rendering the subject-matter of the contract uncertain and doubtful, the office of interpreting its meaning belongs to the court.

To render parol evidence competent, in case of a written contract, it is not enough that there were circumstances known to one of the parties which might have influenced him in making the contract which were not known to the other party; to create an ambiguity that opens the contract to parol explanation, it must be established by proof of circumstances known to all of the parties.

(Argued December 18, 1886; decided January 18, 1887.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York entered upon an order made April 5, 1886, which affirmed a judgment in favor of plaintiffs entered upon a verdict.

This action was brought to recover the purchase-price of certain goods alleged to have been sold by plaintiffs to defendants.

The material facts are stated in the opinion.

John E. Parsons for appellants. It is the province of the court to construe contracts unless the meaning is obscure and

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depends upon the facts *aliunde* in connection with the written language. (*First Nat. Bk. v. Dana*, 79 N. Y. 108.) It is only where terms used are technical, or terms having a peculiar meaning in a particular trade or place, that the aid of the jury is invoked to ascertain their meaning. (*Goddard v. Foster*, 17 Wall. 123; *Levy v. Gadsby*, 3 Cranch. 186; *Bliven v. N. E. Screw Co.*, 23 How. [U. S.] 432; *Etting v. Bk. of U. S.*, 11 Wheat. 75; 6 Cond. R. 215; *Barreda v. Silsbee*, 21 How. [U. S.] 147; *Beggs v. Forbes*, 30 Eng. L. and Eq., 508; *Shore v. Wilson*, 9 Clark & Fin. 569.) Where a question depends upon and is an inference to be drawn from circumstances, it is a question of fact for the jury; but where it turns upon a question of a writing, and no special circumstances need be taken into account, it is a question of law for the court. (*Stokes v. Johnson*, 57 N. Y. 673.) The motion for a nonsuit should have been granted. (*Butler v. Butler*, 77 N. Y. 472.) Only such defects are waived by acceptance as are or can be known to the purchaser by observation at the time of delivery. (*Hoe v. Sanborn*, 21 N. Y. 552; *White v. Miller*, 71 id. 118.) The contract in this case vested the property in the defendants. It was not an executory contract. (*Groot v. Gile*, 51 N. Y. 431; *Terry v. Wheeler*, 25 id. 520; *Kimberly v. Pachin*, 19 id. 330; *Crowfoot v. Bennett*, 2 Comst. 258, 260.) The cases which determine that acceptance constitutes a waiver as between buyer and seller do not apply either to executed contracts of sale or to a breach of warranty. (*Muller v. Eno*, 14 N. Y. 597; *Briggs v. Hilton*, 99 id. 517.)

George H. Forster for respondents. The whole charge must be considered to ascertain if there was any error. (*Jones v. Osgood*, 6 N. Y. 233; *Governors of Alms House v. Am. A. Union*, 7 id. 236; *Lansing v. Wiswell*, 5 Denio, 213; *Caldwell v. Murphy*, 11 N. Y. 416; *Walsh v. Kelly*, 40 id. 556; *Ayrault v. Pacific Bk.*, 47 id. 576; *Beaver v. Taylor*, 93 U. S. 46, 54.) The defendants have no ground of exception to the ruling of the court, that

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the meaning of the words "stock on hand" was not, in this case, a question of law, turning upon the construction of the contract to be determined by the court, but that he should leave it to the jury to say what the parties meant by the use of those words. (*Stokes v. Johnson*, 57 N. Y. 673; *Pitney v. Glenns Ins. Co.*, 65 id. 17; *First Nat. Bk. v. Dana*, 79 id. 108, 116; *Chapin v. Dobson*, 78 id. 74; *Julliard v. Chaffee*, 92 id. 529; *Eighmie v. Taylor*, 98 id. 288.) On an executory contract for the sale of goods to be delivered at a future day, the acceptance of the goods is held to be an admission of due performance by the seller and a waiver of defects, if any there be, in the subject of a sale. (*Reed v. Randall*, 29 N. Y. 358.) The defendants were bound to examine the stocks, and to return the same if not as contracted for. Not having done so, they waived all defects. (*Hargous v. Stone*, 5 N. Y. 73; *Pomeroy v. Shaw*, 2 Daly, 267; *Weaver v. Wisner*, 51 Barb. 638; *Holden v. Clancy*, 58 id. 591; *McCormick v. Sarson*, 45 N. Y. 265; *Woodruff v. Peterson*, 56 Barb. 407; *Gaylord M'fg. Co. v. Allen*, 53 N. Y. 519; *Dounce v. Dow*, 64 id. 415.)

RUGER, Ch. J. Previous to June, 1883, Alfred Brady had for many years carried on the business of making plumbers' castings at a foundry and ware-rooms in the city of New York. Having died in May of that year, his executor determined to dispose of the business and property on hand, and in pursuance of that intention, early in June, effected a transfer of what was called "the plant," to the defendants, at a price agreed upon, and also leased the premises in question to them, from the day of sale, to the first day of January thereafter, and the defendants took immediate possession thereof. On the 20th day of June subsequently they also sold to the defendants their stock on hand and executed and delivered to them a written bill of sale, reading as follows:

"Sold to Cassidy & Adler the entire manufactured stock, in good condition, consisting of pipes, fittings, fines, etc., now on hand at foundry and store-rooms on Fifty-fifth and Fifty-

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sixth streets, Tenth and Eleventh avenues. The price on same to be eighty (80) per cent from list-price, besides the sum of \$700; the stock to be taken without tarring and to be left on premises; the same to be paid for in cash. The receipt of \$100, as part payment of same, is hereby acknowledged.

“I. WINTERBOTTOM,

“Executor.””

The property sold being then upon premises occupied by the defendants, the execution of the bill of sale, passed the title and there remained nothing to be done to complete the purchase, but the preparation of an inventory and the ascertainment and payment of the net price of the property sold.

The preparation of the inventory was immediately set about by the plaintiffs, and it was completed and delivered to the defendants, some time about the middle of July, and it appeared therefrom that the net price of the property included therein, was \$11,955.33.

Upon an examination of such inventory by the defendants, after its delivery to them, they discovered that it did not contain all the property purchased, and that a large amount of pipe, consisting proportionally of the most valuable part of the stock, which had appeared among the goods on hand in the stock at the time of the sale to defendants, was not included in it, and upon demanding an explanation of this circumstance they were informed by the plaintiffs that it had been delivered by them to other parties, customers of the foundry, after the day of sale, upon orders received by them previous to that time, and they claimed the right to make such delivery under the terms of the bill of sale. The defendants protested against this disposition of the property and claimed damages for its removal from the foundry.

The value of the goods, over the contract-price, thus removed amounted to several thousand dollars.

This action was brought to recover the amount shown to be due by the inventory, and the defense was a counter-claim for damages arising out of the withdrawal by the plaintiffs of

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the pipe in question from the stock sold, after the delivery of the same to the defendants. The question discussed relates to the validity of this defense.

No question was made on the trial but that the pipe in question, was on the premises on the day of sale, and was exhibited to the defendants as a part of the stock by the plaintiffs, but it was claimed that such goods ought not to be considered, as included in the terms of the bill of sale.

Neither was it claimed that there was anything ambiguous in the language of the bill of sale, or any doubt or uncertainty arising over the description of the property referred to therein, but it was claimed by the plaintiffs, and held by the trial court, that proof of the circumstances surrounding the sale, and the situation of the parties, created an ambiguity which authorized the plaintiffs to give parol evidence to explain and apply the language used, to the subject of the sale, and limit the effect of the description.

The burden of establishing such a condition of things naturally rested upon the plaintiffs and they attempted to meet by proof the responsibility thus cast upon them.

Evidence was given, by which it was attempted to be shown that they had previous to June twentieth effected sales of pipe, fittings, etc., from the stock, to third parties, which constituted the property in dispute.

The evidence to establish such sales was extremely loose and unsatisfactory, and fails, as we think, to show any valid agreement for such sales. The principal witness on this question was one Newcomb, a former clerk of the plaintiffs, who claims to have bought the bulk of the property, delivered after June twentieth to third persons, from the plaintiffs, and to have sold and delivered it to customers of his own directly from the warehouses leased to the defendants. Some of it was delivered after June twentieth to a purchaser who had previously promised to come and look at the stock and select some goods for purchase, but the most of it was delivered to persons who had no relations with the plaintiffs, but bought directly of Newcomb after the twentieth of June. The only

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authority shown in Newcomb to make such sales arose from a notice given by him to one Finch, an employe of the plaintiffs, about a week previous to June twentieth, to the effect that he would take the balance remaining in the stock of certain kinds of pipe and fittings then specified by him. These goods were not charged to Newcomb at this time, neither was any part of the purchase-price then paid or goods delivered, nor was any memorandum in writing made of the transaction. It does not even appear that the plaintiffs agreed to sell the goods to Newcomb. Some few articles were also shown to have been ordered by two or three different parties previous to June twentieth, and were entered in the books as sold, although they were delivered thereafter, but the amount and value of such goods, does not appear and they were apparently regarded on the trial as of insignificant importance. It is quite evident from this state of facts that even no valid executory contract of sale was made between the plaintiffs and Newcomb, much less that any contract was effected transferring the title of the property in question to Newcomb or the intending purchasers.

It is also clear that the proof did not establish any valid executory contract of sale of such goods to third persons, prior to June twentieth within the provisions of the statute of frauds. (*Rockwell v. Charles*, 2 Hill, 499.)

There was no suggestion in the evidence that the defendants had knowledge of these alleged sales, or reason to suppose that any portion of the stock pointed out as that proposed to be sold, had been previously sold to other parties.

Such an idea could have been entertained by them, only upon the assumption that the plaintiffs were intending to perpetrate a fraud in making a sale to them. Under these circumstances the court upon the trial, left it to the jury to determine what the parties meant by the use of the terms "stock on hand," as used in the bill of sale, whether it meant all of the pipes in the building, whether previously sold to other parties or not, or only those pipes that the executors still owned at the time the contract was made.

The determination of the court to leave these questions to

the jury was duly excepted to by the defendants, and it was further requested to pronounce upon the meaning and intent of the contract in the respect mentioned, which it refused to do, and the defendants excepted to this refusal.

The court also charged the jury that "there was certain stock which they (the executors) owned that was in the inventory. All that was in the inventory Cassidy and Adler got. There was certain stock that they (the executors) did not own, that is not in the inventory, and that Cassidy and Adler have not got."

The defendants duly excepted to so much of this instruction as stated that there was some part of the stock that the executors did not own at the time of the sale to defendants.

We think these exceptions were well taken. The theory that there was any part of the property in question, of which the plaintiffs were not the owners at the time of their sale to defendants, had no support, as we have seen, in the evidence.

Upon the undisputed facts of the case, the plaintiffs had failed to show a contract which, as between themselves and the alleged purchasers, transferred the title of the property.

Notwithstanding all that was said and did, the plaintiffs remained the legal owners of such property, and entitled to dispose of it as they did, to the defendants on the twentieth of June. (*Caulkins v. Hellman*, 47 N. Y. 449; *Burt v. Dutcher*, 34 id. 493; *Benj. on Sales*, 321, §§ 308, 310.)

Even assuming that a valid executory contract of sale was made by the plaintiffs prior to June twentieth, to the purchasers referred to, such purchasers acquired no title to any specific property, and, upon a refusal by the vendors to fill the orders, had a right of action simply for damages.

The effect of the instruction, last referred to, was to withdraw from the jury the consideration of all evidence relating to the prior sales to other persons, and determine, as a question of law, that such transactions effected a transfer of the property referred to, from the plaintiffs to such persons. They were thereby directed to consider the evidence as establishing a change of ownership of the property in dispute, and to

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determine the meaning of the language used in the contract in the light of that circumstance.

We think the evidence was not susceptible of such a construction, and that it wholly failed to show any change of ownership of the property referred to.

We think, also, that it was the undoubted right of the defendants to have the meaning and intent of this contract determined by the court and not by the jury.

The rule is well settled that when the terms and language of a contract are ascertained, in the absence of technical phrases, the meaning of which is obscure, or the existence of latent ambiguities, rendering the subject-matter of the contract uncertain and doubtful, the office of interpreting its meaning belongs to the court alone. (*Dwight v. Germania Ins. Co.*, 103 N. Y. 341; *First Nat. Bk. v. Dana*, 79 id. 108.)

It would be a dangerous principle to establish, where parties have reduced their contracts to writing, and defined their meaning by plain and unequivocal language, to subject their interpretation to the arbitrary and capricious judgment of persons unfamiliar with legal principles and settled rules of construction.

No such ambiguity, however, existed in the language of this contract as made it necessary or proper to refer its meaning to the jury, and the evidence as to the surrounding circumstances established no case showing that any uncertainty existed as to the identity of the property intended to be sold, or as to the meaning and intent of the contract.

Whatever notion might have been entertained as to the understanding of the plaintiffs in respect thereto, there was not the slightest evidence to show that the defendant had any reason to suppose that the contract had any other meaning than that expressed by the literal signification of its language.

It is not enough to render parol evidence competent, that there are circumstances known to one of the parties, but unknown to the other, which might have influenced such party in making a contract, but to create an ambiguity that opens such a contract to parol explanation, it must be estab-

lished by proof of circumstances known to all of the parties to the agreement, and available to all, in selecting the language employed to express their meaning.

This contract, however, was plain and unambiguous in its language, and was susceptible of but one construction. It stated that the subject of the sale was "the entire manufactured stock in good condition, consisting of pipes, fittings, fines, etc., now on hand at foundry and store rooms on Fifty-fifth and Fifty-sixth streets, Tenth and Eleventh avenues."

No technical words are used in the description and no difficulty existed in applying the language used to the subject of the contract with certainty and exactitude.

Notwithstanding this plain description of the property sold, the jury were permitted to find, under the instructions of the court, that it did not mean the entire stock on hand, but that it referred only to so much thereof as remained after other parties had removed such goods as they had previously notified the plaintiffs of an intention to purchase.

The proof showed that the goods thus taken consisted of the most valuable part of the stock, and, if authorized, the construction put upon the language used, effected a very material alteration of the terms of the contract to the damage of the defendants.

Other exceptions to the charge have been called to our attention, which we regard as worthy of serious consideration, but in view of the conclusions reached upon the main point in the case, we deem it unnecessary particularly to refer to or discuss them.

The judgments of the courts below should be reversed, and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

Statement of case.

ALBRECHT J. LERCHE, Appellant, v. WILLIAM M. BRASHER,
as Administrator, etc., Respondent.

104	157
112	436
104	157
113	539
104	157
124	365

In an action to recover for services alleged to have been rendered to defendant's testator, after proof of the rendition of the services, plaintiff, as a witness in his own behalf, was asked if he had been paid therefor, this was objected to as involving a personal transaction with the deceased. The objection was overruled and plaintiff answered "No." Defendant's offered no evidence tending to show payment. *Held*, that while the objection was good the evidence was wholly immaterial and could have done no harm, as payment was an affirmative defense, and the burden of proving it was upon the defendant.

The plaintiff was asked and permitted to testify under objection and exception as to what services he rendered, excepting personal transactions or communications with the deceased. *Held*, that the question was proper in form, and if any improper evidence was given under it, it was defendant's duty to object and move to strike out so much of the answer as exceeded the legitimate scope of inquiry.

A transcript, certified to by the proper officer, of a power of attorney authorizing the conveyance of land, recorded in the clerk's office of county in which the land is situated, is competent as evidence (1 R. S. 763, § 39; Code of Civ. Pro., § 933).

Lerche v. Brasher (37 Hun, 385) reversed.

(Argued December 13, 1886; decided January 18, 1887.)

APPEAL from order of the General Term of the Supreme Court, in the second judicial department, made September 22, 1885, which affirmed an order of the trial court granting a motion made on the minutes for a new trial. (Reported below, 37 Hun, 385.)

The nature of the action, and the material facts are stated in the opinion.

G. A. Clement for appellant. There was no error in regard to the admission of evidence concerning the lost power of attorney. (Code, § 933.) The ground for the exclusion of evidence, made competent by section 933 of the Code, must be made out by the party alleging its incompetency as to the particular matter. (*Pinney v. Orth*, 88 N. Y. 451; *Cary v. White*, 59 id. 339; *Severn v. Nat. State Bk.*, 18 Hun, 228, 229; *Ham v. Van Orden*, 84 N. Y. 271; *Pratt v. Elkins*, 80 id. 201; *Wadsworth v. Hermann*, 85 id. 639.) Neither

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the question nor the answer, as to whether any part of the claim had been paid, called for or disclosed any personal transaction or communication with the deceased. *Pratt v. Elkins*, 80 N. Y. 201; *Ward v. Kilpatrick*, 85 id. 417; *Rowland v. Hegeman*, 1 Hun, 491; S. C. 59 N. Y. 643.) There was no error in the charge of the trial court to the jury that the statute does not prohibit a man, after his employment has been shown by other evidence, from testifying as to the services which he has performed. (*Plattner v. Platt*, 78 N. Y. 91; *Pontiers v. People*, 82 id. 347; Code, § 829; *Kelly v. Burrows*, 19 Week. Dig. 478; *Markell v. Benson*, 55 How. 360; *Tooker v. Gormer*, 2 Hilt. 71; *Merritt v. Campbell*, 79 N. Y. 625; *Miller v. Montgomery*, 78 id. 286.) The alleged counter-claim was not a claim belonging to the decedent and was not allowable. (Code, §§ 501, 505; *Berrian v. Mayor, etc.*, 15 Abb. [N. S.] 207; *Piser v. Stearns*, 1 Hilt. 86; *Mayor v. Parker Steamship Co.*, 12 Abb. 300; *Patterson v. Patterson*, 59 N. Y. 574; *Taylor v. Mayor, etc.*, 82 id. 10; *People v. Dennison*, 84 id. 279.) The reply did not waive plaintiff's right to object to the counter-claim as not allowable. (*Carpenter v. Manhattan Ins. Co.*, 22 Hun, 52; *Smith v. Hall*, 67 N. Y. 51.) Where a charge, taken as a whole, is in accord with the law of the case an appellate court will not speculate as to correctness and significance of detached portions standing alone and unqualified by the context. (*Mosher v. City of Auburn*, 17 Week. Dig. 477; *Mallory v. Tioga R. R. Co.*, 3 Abb. [Ct. App.] 143.) The statute is limited in its legal operative power to objectionable evidence and not to the witness personally. (*McKenna v. Bolger*, 22 Week. Dig. 361.)

Thomas E. Pearsall for respondent. There was error in permitting the plaintiff to testify that the handwriting of the paper shown was that of the deceased it being a personal transaction. (*Holcomb v. Holcomb*, 95 N. Y. 316; *Erben v. Lorillard*, 19 id. 302; *Newman v. Goddard*, 3 Hun, 72; *People v. Zimmerman*, 4 N. Y. [Crim. R.] 272.) The court

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erred in allowing plaintiff to testify against defendant's objection to the question; has any part of this been paid? Answer; no. A negative fact cannot be proved by a witness who is a party and brought within section 829 of the Code. (*Dyer v. Dyer*, 48 Barb. 190; *Howell v. Van Sicklen*, 6 Hun, 115; *Haughty v. Wright*, 12 id. 179; *Boughton v. Bogardus*, 7 N.Y. Civ. Pro.] 252; *Wilson v. Reynolds*, 31 Hun, 47; *Somerville v. Crook*, 9 id. 664; *Baldwin v. Smith*, 5 id. 454; *Williams v. Davis*, 7 N. Y. [Civ. Pro.] 282; *Hill v. Heermans*, 17 Hun, 470; *Fooley v. Bacon*, 70 N. Y. 34; *Chadwick v. Fonner*, 69 id. 406; *Braque v. Lord*, 2 Abb. [N. C.] 14; *Pearce v. Barnett*, 30 Hun, 525; *Harsdell v. Scott*, 26 id. 617.) The court erred in permitting plaintiff to testify to the various services rendered by him for deceased. (*Williams v. Davis*, 7 N. Y. [Civ. Pro.] 282; *Holcomb v. Holcomb*, 95 N. Y. 316; *Fisher v. Verplank*, 17 Hun, 150; *Boughton v. Bogardus*, 7 N. Y. [C. P.] 252.) The court erred in receiving in evidence the power of attorney claimed to have been made by deceased to plaintiff. (*Harsdell v. Scott*, 26 Hun, 617; *Pease v. Bennett*, 30 id. 526.) The court erred in excluding proof of the defense or counter-claim of \$2,000, set forth in defendant's answer, with respect to the improper management of the estate of Pierre M. Van Wyck. (*Wadley v. Davis*, 63 Barb. 500.) Where securities in the hands of a creditor are wrongfully disposed of by him, so that the debtor has a claim upon him for damages for their loss, such damages can be set off against the debt *pro tanto*, in an action at law brought by the creditor for the recovery of the debt. (*Bulkeley v. Welch*, 31 Conn. 339; *Ainsworth v. Bowen*, 9 Wis. 348; *Campbell v. Fox*, 11 Ia. 318; *Gleason v. Clark*, 9 Cow. 57; *Harlock v. Le Baron*, 1 Civ. Pro. R. 168; 7 Wait's Act. and Def. 485; *Herrion v. Norton*, 2 Ashm. [Pa.] 150; *Streeter v. Streeter*, 43 Ill. 155; *Waterman v. Clark*, 76 id. 428; *McEwen v. Kerfoot*, 37 id. 530; *Still v. Hall*, 20 Wend. 51.) It was error for the court to refuse to charge "that if the jury find that Lerche gave away and disposed of the larger part of Van Wyck's estate, without con-

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sideration, and that thereby the estate was more damaged than benefited by his alleged services, then they will be justified in finding that there is no value to the services alleged to have been rendered." (*Harlock v. Le Baron*, 1 Civ. Pro. 168.)

FINCH, J. The plaintiff brought this action, claiming to recover about \$2,600 as compensation for services rendered to Mr. Van Wyck, the defendant's testator, in the character of his agent and attorney. The contract of employment was proved, beyond all question, by evidence wholly uncontradicted, and of a kind open to no criticism. The services rendered began a few days before January 14, 1880, on which day the plaintiff collected a judgment of about \$500 in favor of Van Wyck.

On that day the latter, by a written instrument, the signature to which was proven and not questioned, appointed plaintiff his "attorney in fact" for all matters pertaining to two actions which were specified. That the employment was earlier than that is evident from a letter of Van Wyck, dated December 30, 1879, in which he speaks plainly of the existing relation. Other letters are quite as decisive, and on the 10th day of February, 1880, Van Wyck gave to plaintiff a general power of attorney covering, substantially, the transaction of all his business. The employment was further proved by at least one witness who swore to the statements of the testator to that effect.

The general character of the services contracted for and rendered, was also shown by evidence outside of anything which fell from the plaintiffs. The property of the testator had been taken from him on account of his intemperate habits and placed in the hands of a committee. Van Wyck had become restored to health and capacity and entitled to receive back and manage his property. The committee had placed the estate in the hands of Morris & Pearsall, his attorneys, and in a letter dated February twenty-seventh, Van Wyck notified plaintiff that they had agreed to deliver the papers if he (Van Wyck) would call for them, and adds: "I shall not

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go and so shall answer. They shall settle with you alone." That they did so settle the defendant himself proved. The amount of property thus delivered over was about \$28,000. The defendant also proved the payment of the Walsh mortgage of \$5,500 and the interest upon it to plaintiff. There was thus clear evidence of the employment and the general nature of the services rendered outside of any testimony given by the plaintiff in his own behalf. A verdict was rendered in his favor for \$750 or about one-quarter of his claim. A motion was made upon the minutes and the exceptions taken to set aside the verdict and for a new trial, which was granted upon two grounds relating to the admission of evidence. On appeal, the General Term affirmed the order, but for other and different reasons.

The trial judge specified two such errors as the ground of his action. On the hearing, after the plaintiff had described the work he had done, he was asked if he had been paid for it. To this inquiry the defendant objected, as involving a personal transaction with the deceased. The objection was overruled, an exception taken, and the witness answered "no." The answer negatived a personal transaction with the testator and was equivalent to a declaration that neither the deceased nor his administrator, with the will annexed, had paid for the services rendered. But while the objection was a good one, the evidence was wholly immaterial. The plaintiff was not required to prove the negative, and payment was an affirmative defense, the burden of establishing which was upon the defendant. No evidence in that direction was offered or given, and striking out the inadmissible answer would in no possible respect affect the result reached. We ought not to reverse a judgment on so narrow a ground.

The trial judge further held that it was error to admit the transcript from the register's office of New York of Van Wyck's power of attorney.

When first offered it was objected to as secondary evidence and as no proof of the original. The court said, "it is no proof that Van Wyck executed it; it is simply proof that a

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paper of this kind is on record ;” and thereupon overruled the objection and defendant excepted. The plaintiff then testified, without objection, that he had had the original in his possession but had lost it, and on a careful search, had been unable to find it. At a later period of the case a transcript of the power of attorney was read in evidence against an objection that there was no proof that Van Wyck ever executed it and the paper was incompetent. By the Revised Statutes (vol. 2 [6th ed.] p. 1151, § 73), a power of attorney authorizing, as did the one in question, the conveyance of real estate may be recorded in the clerk’s office of any county in which the land affected is situate and the record be received in evidence with like effect as a conveyance. My first impression was that there was not sufficient proof that Van Wyck owned land situated in New York county, but a careful reading of the evidence shows that while the proof was not direct and pointed, there is an abundance of it from which the natural and necessary inference of such locality follows. The Code provides (§ 933) that a transcript from a record kept “pursuant to law” in a public office of the State, whose incumbent has an official seal, when properly certified by the officer, is evidence as if the original was produced. Under these provisions the transcript was properly received in evidence.

The General Term, in affirming the order for a new trial, placed no reliance upon the objections thus considered but rested its action upon the much more serious ground that the plaintiff was permitted to state in detail the services he rendered, in the face of an objection that such proof involved a personal transaction with the deceased. The trial judge stated distinctly and carefully what he intended to rule. He said that plaintiff could not testify to an employment or request, but where that was proved by other evidence the party might describe simply the things which he did, provided such acts could have been done in the absence of deceased and without his immediate or personal participation. Acting upon this basis the court excluded all evidence of visits to Van Wyck’s residence, or of facts which Van Wyck,

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if living, could have directly contradicted by his own oath, and limited the proof to independent facts. These were that plaintiff collected the Erie judgment, the Walsh mortgage and the assets in the hands of the committee, and to effect those results made certain calls upon the committee and his attorneys, and examinations of records in other counties. The only objection taken was a general one to the question with which the inquiry began, and that question was: "What was done by you, excepting, of course, personal transactions or communications with the deceased, Mr. Van Wyck, from the time you first commenced your labor down to his death?" The objections were thus phrased: "As incompetent and calling for transactions with deceased." The question was proper in form. It called for no objectionable proof, and if any was proffered under it the defendant's duty was to object specifically and move to strike out so much of the answer as exceeded the legitimate scope of the inquiry. Nothing of this kind actually and in terms occurred. The only further objection taken to the evidence, under the provision of the Code, was to the inquiry "how much time" his detailed services occupied. At the close of the case there was an exception to the charge to the jury in which the judge explained the reasons why he permitted the plaintiff to testify to what he did. Whether those reasons were sufficient, or in all respects correct, was immaterial. The sole question was whether any of the evidence objected to and admitted was competent under the Code. Some of it, we think, was. Possibly one objection might be treated as a motion to strike out an answer. To the inquiry, proper in form because excluding personal transactions or communications, the witness said: "I went to Morris & Pearsall's office and got the papers in the case of Van Wyck, by committee, against Ostermeyer and Brasher, and went to Albany to prepare the case with Judge Hand for the Court of Appeals." The record adds, "objection to this evidence renewed," "as calling for a transaction with the deceased." If we indulge in the latitude of treating this, which is the sole specific

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objection taken, as fairly equivalent to a motion to strike out, we are still of opinion that the two facts related were independent facts, in which the deceased was not personally a participator and which, if living, he could not, for that reason, have contradicted. They might have been done without his authority or knowledge, as were some other acts of the plaintiff, and did not necessarily involve a personal transaction with him. When that inquiry arose, by reason of his employment or request, the mouth of the witness was closed. If that employment or request, in any manner or to any extent rested upon an inference drawn from the character of the facts done, the evidence would be incompetent. But no such error was committed. The jury were expressly warned against it and told "before you can find the fact of the employment you must be satisfied of it by testimony other than his own." On this state of the record we think the ruling at the trial was not erroneous, and especially for the reason that the facts specifically challenged were substantially proved by the deceased's own written communications.

The General Term intimated a doubt whether defendant's counterclaim was not erroneously excluded. The court admitted the facts as a defense and excluded them as a counter-claim, and with this ruling the defendant seems to have been contented for he took no exception.

The orders appealed from should be reversed, and the judgment for plaintiff ordered on the verdict, with costs.

All concur, except RAPALLO, J., not voting.

Orders reversed and judgment accordingly.

104	164
133	434
104	164
164	519

JAMES H. TRUESDELL, Heir-at-law, Executor, etc., Respondent, v. HENRY J. SARLES et al., Appellants.

Where, in an action by judgment-creditors to set aside a conveyance by a husband through a third person to his wife, on the ground that the same was fraudulent as against creditors, it appeared that the conveyance was for a good consideration, and there was no fraudulent intent or facts

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proved from which fraudulent intent could be inferred. *Held*, that a refusal to nonsuit was error, although as against creditors the conveyance might have been converted into a mortgage; that such relief could only be given upon proper evidence in an action where it was consistent with the case made by the complaint and embraced within the issues. The fact that previous to such a conveyance credit has been given to the husband, and that the creditor was not informed of the conveyance when a subsequent credit was given is no evidence of fraudulent intent.

(Submitted December 10, 1886; decided January 18, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 18, 1885, which modified, and affirmed as modified a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

The nature of the action and the material facts are stated in the opinion.

John Gibney and *Francis Larkin* for appellants. The conveyance to the defendant's wife was valid, and will be sustained. (*Carr v. Brees*, 81 N. Y. 584; *Phoenix Bk. v. Stafford*, 89 id. 405; *Dunlap v. Hawkins*, 59 id. 342; *Jenks v. Alexander*, 11 Paige, 623; *Jackson v. Post*, 15 Wend. 588; *Phillips v. Wooster*, 36 N. Y. 412; *Van Wyck v. Seward*, 6 Paige, 62, 526; *Babcock v. Eckler*, 24 N. Y. 623; *Carpenter v. Row*, 10 id. 227.) The word "creditors," as used in the statute, means creditors at the time of the conveyance. (3 R. S. [7th ed.] 2329, § 1.) Mrs. Sarles was a purchaser for a valuable consideration, to wit, \$1,000. (3 R. S. [7th ed.] 2330, § 5.)

Wm. G. Valentine for respondent. The deed to the defendant's wife was invalid. (*Shand v. Hanley*, 71 N. Y. 319; *Savage v. Murphy*, 34 id. 508; *Case v. Phelps*, 39 id. 164; *Carpenter v. Roe*, 10 id. 227.)

DANFORTH, J. This is a contest between the plaintiff as executor of one Darius Truesdell, a judgment creditor of Henry J. Sarles, with execution issued and returned unsatis-

fied, on one side, and the debtor and his wife Adaline on the other, concerning the title to certain real estate conveyed to her through one Gidney as an intermediary. The complaint alleges that the judgment was recovered October 19, 1881, in an action commenced August 17, 1881, upon an account for goods, that Henry J. Sarles acquired title to the premises in question in 1871, and his deed to Gidney and that from Gidney to Adaline were given June 7, and recorded June 20, 1877, without consideration, with the sole purpose and intent to hinder, delay and defraud creditors, and with notice to Adaline of her husband's indebtedness to the plaintiff and other persons, but she nevertheless holds the legal title and claims "to be the owner of the real estate in her own right." The plaintiff asks judgment that the conveyances be canceled of record, as fraudulent and void as to creditors of Henry J. Sarles, that the real estate described in them be declared to be his property and the judgment a lien upon it.

The defendant Adaline by answer put in issue the allegations of the complaint, alleged that the deed to her was upon the actual consideration of \$1,000 as expressed therein, and made for the purpose of conveying to her the legal title, with no intent to defraud any creditor or other person, but in good faith. The answer of Henry J. Sarles, so far as any question here is concerned, was in substance the same.

The learned trial judge found that when conveyed to Adaline the premises were subject to a mortgage of \$1,000, and so far from finding that she paid no consideration, he found that the conveyance to her was for the consideration set up in her deed and answer, and instead of directing the cancellation of the deed as void, declared that it should stand "as a mortgage security in the sum of \$1,000," but that subject to it the plaintiff's judgment should be a lien upon the property, and rendered judgment accordingly, with costs to be recovered of Adaline and Henry J. Sarles. Upon appeal the General Term held that it was justly found that the conveyance was a mortgage, but as Adaline had maintained her defense, she should not pay costs, but on the other hand have

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her claim established at \$1,000, with interest from April 1, 1872, and costs of the action, and so modified and then affirmed the judgment of Special Term.

We think the circumstances of the case required the General Term to go further and reverse rather than modify the decision of the trial judge. Upon the issues formed by the pleadings the question was whether the evidence disclosed fraud either in fact or law sufficient as against Adaline Sarles to set aside the deed under which she claimed title. This was the only available ground of relief and the burden of proving it was on the plaintiff. It is hardly necessary to criticise the evidence, for the judgment of neither court follows the plaintiff's prayer, or the statement of his cause of action. It is therefore in violation of the well settled rule that no judgment can be given in favor of a plaintiff on grounds not stated in his complaint, nor relief granted for matters not charged, although they may be apparent from some part of the pleadings or evidence. (*Rome Ex. Bk. v. Exmes*, 1 Keyes, 588; *Wright v. Delafield*, 25 N. Y. 266; *Southwick v. First Nat. Bk.*, 84 id. 420.)

This point was fairly presented by the exception taken at the close of the plaintiff's case, and again at the close of the testimony, to the refusal of the trial judge to grant the defendant's motion to dismiss the complaint, and by exceptions to the refusal to find certain conclusions of law to which his attention was directed.

So far from sustaining the plaintiff's cause of action, the decision of the Special Term and the final judgment of the General Term not only in effect, but directly affirmed the validity of the conveyance to Adaline. There is not only no finding of a fraudulent intent on her part, but the precedence and right of security with indemnity against costs adjudged to her, are equivalent to a finding that she was innocent of fraud, or notice of any intended fraud on the part of her grantor. She stands then upon the record as a grantee for a valuable consideration, and this, even if inadequate in amount, is sufficient to sustain her title (2 R. S. 137, § 5).

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The decision of the court below is therefore wholly inconsistent with the contention of the plaintiff as expressed in his complaint, that the deed was fraudulent in fact on the part of both husband and wife. Nor does the evidence permit the conclusion that it was obtained under even suspicious or inequitable circumstances.

Already encumbered with a mortgage of \$1,000, the property was conveyed in pursuance of an agreement that the grantee should have the title in consideration of \$1,000, confessedly her own money, advanced and paid towards the building of the house. According to testimony taken upon supplementary proceedings and introduced by the plaintiff, the debtor "at the time of the transfer, and for years afterwards, was solvent and able to pay his debts at a moments notice." This evidence was substantially reiterated by the debtor upon the trial, and neither by cross examination nor otherwise was a different state of his affairs presented. It is shown that in 1872, he was dealing with the plaintiff, but he paid fully and promptly, first by note at short intervals, and then met the notes at maturity, according to the usage between them, and although he continued from 1872 to 1881, to buy of the plaintiff, the debt in judgment was in no part an old one, but contracted as the evidence disclosed and the trial judge found, between the 26th of March, 1881, and the 21st of May, 1881. The fact that the plaintiff had given credit previous to the deed, and was not informed, when subsequent credit was given, of the conveyance to the wife, is no evidence of fraudulent intent. (*Carr v. Breeze*, 81 N. Y. 584.) There are, therefore, no facts or incidents showing intended fraud, no act susceptible of fraudulent operation, and if there are, in truth, circumstances which would permit a court to turn the absolute conveyance into a mortgage, they are neither alleged in the complaint nor stated in evidence.

Our attention, however, is called by the learned counsel for the respondent to a request made by the defendant and a finding by the trial judge in assent thereto, viz., "that at the date of said conveyance, July 7, 1877, and for three or four years pre

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vious thereto, the said Henry J. Sarles was indebted to his wife in the sum of \$1,000, which was loaned to him by her (and which was given to her by her father) and expended in the erection of the house upon the premises described in the complaint by the defendant Henry J. Sarles, and the conveyance was made to his wife in pursuance of an agreement by her husband to convey to her the said lot of land for security for the said \$1,000, which was the consideration for said conveyance to his wife, the defendant, Adaline Sarles." This was presented after unsuccessful motions to dismiss the complaint, and evidently not in aid of the judgment subsequently given, for it was made the basis of a request for other findings and for conclusions of law (1) that the deeds conferring title on the defendant Adaline "were made, executed and delivered in good faith and for a valuable consideration, without intent to hinder, delay or defraud the creditors of the defendant Henry J. Sarles, or the said plaintiff of their or his lawful debts or demands," and "that the defendants have judgment for the dismissal of the complaint in this action together with the costs and disbursements of the same," and these requests being denied, the defendants excepted to both refusals.

The exceptions were well taken; to the refusal to dismiss the complaint, for no case had been made out; to the refusals to find as requested, because the evidence warranted nothing less.

Nor was the right to insist upon the point made by the first exception waived by the subsequent request. Having failed to obtain the entire relief asked for, the defendant might demand less without losing any right to complain of the denial of the whole. The cases (*Carpenter v. Roe*, 10 N. Y. 227; *Savage v. Murphy*, 34 id. 508; *Case v. Philips*, 39 id. 164; *Shand v. Hanley*, 71 id. 319), cited by the respondent are not analogous. In all it appeared that the conveyances in question were voluntary. In *Carpenter v. Roe* the debtor was largely in debt and his solvency contingent upon the stability of the market in which at the time he speculated and failed within fifty days thereafter. In the others the deeds were

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made with a view to continued and future indebtedness, with intent to avoid payment thereof, and all parties conspired to carry out the fraudulent purpose. Here the deed was upon a valuable consideration, without fraudulent intent, or facts from which such intent could be inferred. As between the debtor and his wife, the property belonged to her, and if as against creditors the deed is to be converted into a mortgage it must be upon proper evidence in an action where such relief will be consistent with the case made by the complaint and embraced within the issue.

Upon the case as now presented the plaintiff failed, the defendant's exceptions were well taken, and the judgments of the General and Special Terms should be reversed, and a new trial granted, with costs to abide the event.

All concur, except RUGER, Ch. J., and EARL, J., dissenting. Judgment reversed.

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133	321
104	170
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THE PEOPLE ex rel., JOHN F. BRIDGEMAN, Respondent, v.
BENJAMIN H. HALL, Appellant.

In an action in the nature of a *quo warranto* to determine the title to the office of chamberlain in the city of Troy, it appeared that by the city charter the mayor has authority, in case of a vacancy in said office, to nominate for a full term of three years, and also, in case of the absence of the incumbent to appoint for a temporary period. In February, 1884, the mayor addressed a communication to the common council, which recited that C., the then incumbent of the office, whose term expired October 7, 1884, "had abandoned his office, and according to accounts had left the city" a defaulter and appointed defendant "to discharge the duties of the office" during the absence of C. The relator was appointed and confirmed as chamberlain in May, 1885, "for the ensuing term of three years." *Held*, that the appointment of defendant was intended merely as a temporary one, and if the mayor had no power to make such an appointment it was a nullity and did not enure as an appointment for a full term.

People ex rel. Andrews v. Lord (9 Mich. 227); *Stadler v. City of Detroit* (13 id. 346); distinguished.

In February, 1885, another action in the nature of a *quo warranto* was brought on the relation of the present relator against defendant. The

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relator then claimed under a nomination and appointment made January 15, 1885; defendant claimed under the same appointment upon which he bases his claim in this action. Judgment was rendered in that action in June, 1885, against the relator and in favor of defendant, but it was declared therein that it was not decided or intended to be decided whether defendant was legally chamberlain under a temporary appointment or under one for a full term, and the relator was defeated on the ground that he had failed to give a proper bond. *Held*, that said judgment, while it necessarily determined that defendant's appointment was valid, was not conclusive that it was for a full term, and so the judgment did not constitute an estoppel.

A judgment is not an estoppel as to any fact not expressly decided, and as to which contradictory inferences may be drawn, from different provisions in the judgment.

(Argued December 14, 1886; decided January 18, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made at the January Term, 1886, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was in the nature of a *quo warranto* to determine the title to the office of chamberlain of the city of Troy.

The material facts are stated in the opinion.

Esek Cowen for appellant. No acting chamberlain could be appointed during Church's absence, because the charter evidently contemplates a temporary sickness or absence, and Church's absence was not one of that character. (*Bernard v. Hoboken*, 27 N. J. [L. R.] 412; 96 Ill. 429; *Cadwalader v. Howell*, 18 N. J. [3 Har.] 145; *Hampden v. Levant*, 50 Me. 559; *No Yarmouth v. W. Gardiner*, 58 id. 207; *Stocking v. State*, 7 Ind. 329; *State ex rel. Van Buskirk v. Boecker*, 56 Mo. 17; *People ex rel. v. Osborne*, 7 Col. 612.) The only powers granted to the mayor and common council, in this case, under the law, were to appoint a chamberlain, and as the law fixed the term of the office of chamberlain, at three years, any words added, the intention of which was to limit or modify or restrict the term of office, were not only sur-

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plusage, but impertinent matter to be utterly disregarded. (*Parker v. Baker*, Clarke's Ch. 225, 226; *In re Hennen*, 13 Peters, 236; *People v. Ransom*, 56 Barb. 519; *Hartshorn v. Schoff*, 51 N. H. 316; Kent's Com. 619; 1 Pars. on Cont. [4th ed.] 58; *Hudson v. Jeff. Co. Court*, 28 Ark. 360; *Glass v. Ashbury*, 49 Cal. 571; *McPherson v. Foster Bros.*, 43 Ia. 48; 9 Mich. 227; 13 id. 346.)

R. A. Parmenter for respondent. An office is filled, and the title vested in the party who is discharging its functions under a valid election or appointment, and his continuance in the office should be permitted until some officer or tribunal, authorized by law, shall in a regular way oust him because of his failure to meet the full statutory requirements. (*Foot v. Stiles*, 57 N. Y. 399; *Cronin v. Stoddard*, 97 id. 271; *In re Kendall*, 85 id. 302; *Horton v. Parsons*, 37 Hun, 42; *People ex rel. Woods v. Crissey*, 91 N. Y. 616.) There was no obligation on the part of Mr. Hall to accept the office under the qualified appointment which he received. But having accepted under such a restricted appointment, he cannot now properly claim that its character should be enlarged so as to confer upon him a term which it was not intended to give, and which he did not for a moment suppose he was entitled to when he commenced to discharge the duties of the office. His acts have concluded him from lawfully asserting such a claim. (*People ex rel. Cowles v. Ferguson*, 20 Week. Dig. 276.) On the trial of an action in the nature of a *quo warranto*, the defendant must establish his title *de jure*. (*People v. Bartlett*, 6 Wend. 422; *People ex rel. Judson v. Thacher*, 55 N. Y. 525; *People ex rel. Hetzell v. Hall*, 80 id. 127; *Olmstead v. Dennis*, 77 id. 378; *People ex rel. Henry v. Nostrand*, 46 id. 382; *People v. Hopson*, 1 Den. 574-579; *People v. A. & S. R. R. Co.*, 55 Barb. 346-385.) Hall's appointment, made February 7, 1884, may not be legally construed as a nomination by the mayor for a full term. (*People v. Fitzsimmons*, 68 N. Y. 520; Laws of 1880, chap. 30, §§ 2, 3, 4, 5.) The mayor had the right to judge whether there was a temporary

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or a permanent abandonment upon the facts presented. (*State ex rel. Connell v. Allen*, 21 Ind. R. 516, 522.) A judgment against a party sued as an individual does not bind him when sued as a trustee; nor would it be an estoppel in a subsequent action in which such party prosecuted or is sued in his trust capacity. (*Rathbone v. Hooney*, 58 N. Y. 463; *Ferguson v. Mass. Mut. Fire Ins. Co.*, 22 Hun, 320; Code Civ. Pro., § 1209.) In general he who by way of estoppel sets up a former verdict or judgment must establish by competent evidence that the same fact sought to be litigated in the second suit was put in issue in the former one. (*Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474.) The conclusive character of a judgment as *res adjudicata* extends only to substantive and identical issues, and if the vital issue of a later litigation has been directly determined it may not be litigated again. (*Palmer v. Hussey*, 87 N. Y. 463; *Lorillard v. Clyde*, 48 Supr. Ct. 409; *People ex rel. Gilchrist v. Murray*, 73 N. Y. 535; *Flanagan v. Flanagan*, 8 Abb. [N. C.] 413, 422; *Webb v. Buckelew*, 82 N. Y. 555; *Audubon v. Excelsior Ins. Co.*, 27 id. 216.) When a party brings a suit as assignee of a mortgage to foreclose the same, and fails in such suit in consequence of a defect in his title as assignee, the judgment of dismissal is no bar to a second action of foreclosure, brought by him after he has perfected his title by taking the requisite assignment. (*Mitchell v. Cook*, 29 Barb. 243, 249, 253; S. C. 26 How. 599.) It devolves upon a party who would enforce an estoppel to present a case free from all doubt. (*Bernard v. City of Hoboken*, 27 N. J. L. R. 412; *Marsh v. Masterton*, 23 Week. Dig. 239; S. C., 101 N. Y. 401.)

ANDREWS, J. We think the judgment should be affirmed, and shall content ourselves by stating briefly the reasons for this conclusion.

The controversy relates to the title to the office of chamberlain of the city of Troy at the time of the commencement of the action, in September, 1885. The relator claims title by

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virtue of his nomination by the mayor, May 21, 1885, for the office of chamberlain "for the ensuing term of three years," and its confirmation under the provisions of the charter, by the failure of the common council to reject the same. The defendant claims title under a written appointment, contained in a communication addressed by the mayor to the common council, dated February 7, 1884, in which the mayor, after reciting that "Henry S. Church, the chamberlain of the city, had abandoned his office and according to accounts had left the city," and also that a partial examination of his accounts rendered it morally certain that he was a defaulter, concluded as follows: "Under these circumstances, and in pursuance of the provisions of the charter, I do hereby appoint, subject to your approval, Benjamin F. Hall, to discharge the duties of the office of chamberlain during the absence of Henry S. Church." The communication was received by the common council on the day of its date, and the appointment of Hall was thereupon approved by a majority vote of the council. It is insisted by the defendant that although the appointment on its face was an *ad interim* one, it was in legal effect an appointment for the full term of three years, for the reason that the mayor, under the circumstances existing at the time, had no power to make a temporary appointment, but had power to nominate a chamberlain for a full term, and no other, and that the appointment and confirmation of Hall must be referred to the power actually existing, and not to that attempted to be exercised, and that the restriction contained in the terms of the appointment was therefore nugatory. If this contention is well founded, the defendant was the rightful incumbent of the office when this action was commenced in September, 1885, as his term would not expire until February 7, 1887. If, on the other hand the appointment of Hall was valid as an *ad interim* appointment only, or was wholly void, and these questions are now open for decision, notwithstanding the adjudication in the former action, then it is conceded that the relator is entitled to the office under the nomination and confirmation

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of May 21, 1885. It is plain that if the appointment of Hall was valid only as a temporary appointment during the absence of Chamberlain Church, his right to hold the office expired on the resignation of Church, April 2, 1884, or at all events on the expiration of Church's term, October 7, 1884. In either case there was a vacancy in the office, May 21, 1885, which could be filled by a nomination and an appointment for a full term.

The main question is as to the character and legal effect of Hall's appointment, February 7, 1884. The chamberlain, under the Troy charter, is to be nominated by the mayor, and confirmed by the common council, and has a term of three years. The charter also contains this provision. "In the event of the sickness or absence of the chamberlain, if he shall neglect to appoint some suitable person to discharge the duties of the office, the mayor may appoint some suitable person, to be approved by the common council, to discharge the duties of the office during such sickness or absence." The appointment of Hall plainly indicated on its face that it was an attempt to exercise the power conferred by this provision, and that it was not intended as a nomination for a full term. It assumed that there was no vacancy in the office, but that circumstances existed which justified the exercise of the power to make a temporary appointment under the provision referred to. It is insisted, however, by the defendant, that the exigency contemplated by the charter, had not arisen, and that the mayor had in fact no authority to make a temporary appointment for the reasons, *first*, that Church, although he had acted as chamberlain under a regular appointment for one full term and part of a second term, was never in fact chamberlain *de jure*, by reason of not having filed a proper bond, and that therefore no acting chamberlain could be appointed in his place, he being an officer *de facto* merely; *second*, that the flight of Church was not such an absence as was contemplated by the charter; and, *third*, that his flight from the city with an intention not to return to Troy, as is found, was an abandonment of the

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office and a removal from the city which created a vacancy which could be filled only by an appointment for a full term.

We deem it unnecessary to consider whether, under the circumstances disclosed, the power to make a temporary appointment existed February 7, 1884. It is clear that the mayor supposed he had the power and undertook to exercise that power and that alone. Assuming that the mayor had no power to make a temporary appointment, for any or all the reasons urged, the necessary result upon that assumption is, we think, that the attempted appointment of Hall was a nullity. The mayor has power by the charter, in case of a vacancy, to nominate for a full term, and also a power to appoint for a temporary period, viz., during the absence of the incumbent. He has, in other words, two distinct powers relating to the same general subject, one of which he attempted to exercise, and so declared, but it turns out that his only authority in the particular contingency was to exercise the other power, which he did not intend or attempt to exercise, but plainly excluded from his consideration. It is sought to make his act stand as an execution of the other power contrary to his intention. We find no authority justifying such a contention. Under the general principles of agency and powers such a result is excluded. Lord COKE says (Co. Litt. 258b): "Regularly it is true that when a man doth less than the commandment or authority committed to him, then the commandment or authority being not pursued, the act is void. And when a man doth that which he is authorized to do, and more, that is good for that which is warranted, and void for the rest. Yet both these rules have divers exceptions and limitations." (See, also, Sugden on Powers, chap. 5.) Where an agent does an act in excess of his authority, and the excess is separable, the act in many cases may stand so far as it is authorized, and for that the principal may be bound. But where an agent or the donee of a power does a different thing from what he is authorized to do, and what he does is intended as an exercise of one of several powers, and he does the act for one purpose and in the assumed exercise of one

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specific power, it would seem to be contrary to reason to treat the act as done under a different power, and make it binding, contrary to the intention. There are certainly very strong reasons founded in public policy against permitting a person to claim and hold a public office in such a case and under circumstances such as are disclosed in this record, against the intention and through the mere mistake of the appointing power as to the existence of extrinsic facts, supposed to exist, and which, if they had existed, would have rendered the appointment valid according to its terms. It might very well be that the public interests would, in the judgment of the mayor and common council, require a different appointment for a full term than for a temporary period. The restrictive words in the appointment cannot be disregarded without changing the essential character of the appointment. They constitute an integral part of the transaction and cannot be separated from the prior words without subverting the whole intention of the appointing power. We conclude, therefore, that if the power to make a temporary appointment could not, under the circumstances, be exercised, the appointment of Hall was void, and did not enure as an appointment for a full term. The question involved in the Michigan cases (*People ex rel. Andrews v. Lord*, 9 Mich. 227; *Stadler v. City of Detroit*, 13 id. 346) is not presented. There the appointing power attempted to exercise a power of appointment clearly defined, but by inadvertence or misapprehension, put a limitation upon the appointment, which was unauthorized. Here, upon the assumption made, there was an attempt to exercise a special power, which, under the circumstances, could not be exercised for any purpose, or to any extent whatever, and there was no attempt to exercise the actual power.

The remaining question arises in respect to the estoppel of the former judgment. The prior action was founded upon the title of the relator under his prior nomination and appointment of January 15, 1885. The defendant set up, as in this case, his appointment of February 7, 1884. Judgment was

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rendered in that action against the relator and in favor of the defendant. It is now insisted that the judgment is conclusive that the appointment of Hall was for the full term of three years from February 7, 1884. It is clear that this point was not adjudicated on the face of the judgment. On the contrary, the judgment, while affirming the title of the defendant to the office, expressly declares that it was not decided, nor intended to be decided, whether he was legally chamberlain under a temporary appointment, or under an appointment for a full term of three years. But the argument is, that as the only title which Hall had was under the appointment of February 7, 1884, the judgment necessarily determines that that appointment was a valid one, and as the judgment further determined that Hall was the rightful chamberlain when the judgment was rendered (June 6, 1885), and as this could not be true if the appointment was a temporary one only, it follows that the appointment of February 7, 1884, must have been for a full term and must have been so determined. The judgment, doubtless, did determine that the appointment of February 7, 1884, was a valid appointment. But this concession does not help the defendant in raising an estoppel, unless he can show further that the judgment also determined that the appointment was for a full term. This point the court expressly refused to decide. It is sought to be inferred, as a necessary sequence to the fact found, against the express disclaimer in the judgment itself. But it is a decisive answer to the defense of *res adjudicata*, that judgment passed against the relator in that action on a ground which is utterly inconsistent with an adjudication that Hall's appointment was for a full term. In that action both the title of the relator and of the defendant were in issue. The relator was defeated on the ground that he had omitted to give a proper bond, under the appointment of January 15, 1885, and so the judgment declares. This clearly implies that, but for this omission, his title to the office under that appointment would have been valid. This could not be so if the appointment of Hall was for a full term, as that term would not expire till February 7, 1887. The most that the defendant is entitled to claim is

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that the judgment contains contradictory and inconsistent implications, one, that the appointment of February 7, 1884, was for a full term, and the other that it was a temporary appointment only. Under this situation the matter is set at large and the judgment constitutes no estoppel. It comes within the qualification stated in the Duchess of Kingston's case, that a judgment is not conclusive of "any matter to be inferred by argument from the judgment." It is unnecessary to consider other grounds urged against the conclusiveness of the former adjudication.

The former judgment, not being in the way of an adjudication of the case upon the merits, we are of opinion that, for the reasons stated, the judgment should be affirmed.

All concur.

Judgment affirmed.

SUSAN ARMSTRONG et al., Executors, etc., Respondents, v.
ESTHER McKELVEY, et al., Appellants.

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The will of S. directed his executors to sell his real and personal estate, and, after paying his debts, funeral expenses and certain legacies, to divide the balance among the defendants herein. The executor sold and conveyed the real estate to one B. Defendants thereupon brought an action against the executors and B. to set aside the conveyance. The judgment therein granted the relief sought, and also decided that the land descended to the devisees, subject to the execution of the power, as the time for the execution thereof had expired, and that they were entitled to the possession as rightful owners, freed from the trusts. In an action under the Code of Civil Procedure (§ 1843) to charge defendants as such devisees with a debt of the testator. *Held*, it was to be assumed that the provision, above referred to, was inserted in said judgment at the request and by the procurement of the defendants and when they took possession under the judgment this established their election to avoid a sale and take their legacies in the land itself instead of the proceeds; that they had the right to do this, no other rights intervening, or being prejudiced; that it might be, while this reconversion changed the legatees to devisees, it did not divest the heirs-at-law of their legal title, yet such legal title was purely formal, and the effect of defendants' election was, at least, to vest in them the equitable ownership and the entire beneficial interest, and therefore the action was maintainable.

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The provision of said Code, under which the liability of devisees in such case arises, does not require, as a condition, that the legal title shall have passed, they are made liable "to the extent of the estate, interest and right in the real property which * * * was effectually devised to them."

Aside from the provision in question, the will gave legacies to two of the defendants. The judgment herein, in making the apportionment of plaintiffs' claim, added to the share of each of these defendants the proportionate part of the legacies given them in excess of their co-tenants. *Held* no error; that having chosen to take their entire legacies in land, they became liable to creditors under the statute to the extent awarded.

The allowance as an equitable offset, to reduce a demand in suit of an item, which cannot be allowed as a legal offset or counter-claim, is only proper where the equity invoked is entirely clear and certain, where other remedies are impossible, and where the demand allowed is put beyond reasonable doubt.

(Argued December 15, 1886; decided January 18, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 5, 1886, which affirmed a judgment in favor of plaintiffs, entered on the report of a referee. (Reported below, 39 Hun, 213.)

The action was brought originally by the plaintiffs' testator to charge the defendants as devisees of one Robert Smith with the payment of a debt against him.

By his will Smith bequeathed to the defendant, Jennie McKelvey, \$200, and to the defendant, Esther McKelvey, \$200. He directed the executor to provide a headstone for his grave. The third clause of the will is as follows: "I hereby order my executor to sell all my real and personal property at public or private sale as he may think best to do, within eighteen months after my death, and the proceeds and avails arising from the sale of my real and personal property after the legacies above mentioned are paid, and my just debts, funeral expenses and grave stone are paid, to divide the balance equally between the following persons," naming the defendants.

The testator died seized of real estate of the value of upward of \$9,000, which the executor sold and conveyed to one Hartman. In an action brought by the defendants in this action against the executor and Hartman for that purpose, the sale

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and conveyance were set aside, and the referee before whom that action was tried, amongst other things, found and determined and it was by the judgment therein declared, that the land descended to the devisees (the defendants in this action) subject to the execution of the power; that the period in which the executor was empowered to sell having expired, he as such, or as trustee, could not execute the power, so as to give title to a purchaser, and that the plaintiffs in that action were entitled to the possession of the premises as the rightful owners thereof discharged and released from the said trust.

The testator, at the time of his death, was indebted to one Pridmore, the latter in an action against the executors, recovered a judgment thereon, and in proceedings had before the surrogate to obtain settlement and application of the personal property of the estate, it appeared that there was none to apply upon his claim. He afterwards assigned the judgment and the debt for which it was recovered to the plaintiffs' testator, who died, and the plaintiffs were substituted during the pendency of the action.

Further facts are stated in the opinion.

James Wood for Appellants. When a testator directs his land to be sold, and the proceeds divided, the obvious purpose is a sale for the convenience of division, and the beneficiaries take their several interests as money, not as land. (*Lorillard v. Coster*, 5 Paige, 172, 207; *Bolton v. De Peyster*, 25 Barb. 539; *Arnold v. Gilbert*, 5 id. 190; *Meaking v. Cromwell*, 5 N. Y. 136; *Johnson v. Bennett*, 39 Barb. 237.) The title vested in the heirs-at-law of the testator, subject to be defeated by the execution of the power. (*Catton v. Taylor*, 42 Barb. 577; *Germond v. Jones*, 2 Hill, 569; *Willard on Real Estate*, 261; *Williams on Ex'rs*, 578; 4 Kent's Com. 320; *People ex rel. Shano v. Scott*, 8 Hun, 566; *Pren-tice v. Janssen*, 79 N. Y. 478.) An estoppel by judgment in a former action, arises where the same matter was at issue therein, and was either litigated by the parties and determined; or might have been litigated and a decision had upon

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it. (*Smith v. Smith*, 79 N. Y. 634; *Stowell v. Chamberlin*, 60 id. 272; *McFadden v. Ross*, 34 Alb. L. J. 34; *Munday v. Vail*, 34 N. J. L. 418; *Fairchild v. Lynch*, 99 N. Y. 359; *King v. Chase*, 15 N. H. 9; S. C. 41 Am. Dec. 675; *Wood v. Jackson*, 8 Wend. 9; S. C. 22 Am. Dec. 603; *Smith v. McCool*, 16 Wall. 560; Bigelow on Estoppel, 92.) The general rule is that the issuable facts or matters, upon which the plaintiffs' case proceeded, determine what was at issue, unless it appears, from an examination of all the pleadings in a given case, that other matters were brought forward, and thus became necessarily involved and determined in the suit. (*Goble v. Dillon*, 86 Ind. 327; *Griffin v. Wallace*, 66 id. 410; *Davis v. Brown*, 94 U. S. 423; *Russell v. Place*, id. 605.) The defendants were in no way concluded or affected by the judgment which Pridmore obtained against the executor, not being parties to that action or privies to it. (*Sharp v. Freeman*, 45 N. Y. 802.) When there are mutual demands between the parties, which cannot be set off under the statute, but which a court of equity may compensate or apply in satisfaction of each other, without interfering with the equitable rights of any person, the fact that one of the parties is insolvent has frequently been held a sufficient ground for the exercise of equity. (*Coffin v. McLean*, 80 N. Y. 561; *Smith v. Felton*, 43 id. 419, 423.)

J. B. Adams for respondents. The amount to be paid was ascertained under the contract by a mere computation, and for default in payment thereof interest is chargeable. (*Still v. Hall*, 20 Wend. 51; *Van Rensselaer v. Jewett*, 2 N. Y. 135; *De Lavallette v. Wendt*, 75 id. 579; *Purdy v. Phillips*, 11 id. 406.) Defendants had a right to elect to take the real estate as such instead of its proceeds. (*Prentice v. Janssen*, 79 N. Y. 478).

FINCH, J. The opinion of the General Term, upon an appeal to that tribunal, is an adequate and accurate solution of the questions involved and leaves for us only the duty of

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testing the criticism with which it is assailed. The argument against it in the end comes down to a single point, which challenges the proof relied upon to establish a reconversion of the personal estate into land. It begins with the proposition that the will of the testator gave to the defendants the price or proceeds of the real estate, effecting an equitable conversion, and the legal title to the land descended meanwhile to the heirs-at-law, who are not identical with the legatees; and that the sale by the executor, when set aside by the court, simply restored the *statu quo*, and the judgment rendered, so far as it went beyond that relief, was outside of the issue and bound nobody as a record, or by way of estoppel. The argument then, assuming that the legal title remains yet in the heirs-at-law, denies that the legatees have received either the price of the land or the land itself, and so insists that the necessary facts were not proven to establish a liability to the creditor. It is at this point that collision with the opinion of the General Term for the first time begins, since that opinion distinctly concedes the descent of the legal title to the heirs-at-law, and does not hold that the judgment, *if* so far as it decrees a reconversion into land and a title to that land in the defendants, is binding upon them to its full extent either by its direct force or by way of estoppel. It uses it in another manner and for a different purpose. It assumes with entire accuracy, that the provisions referred to were inserted in the judgment, at the request and by the procurement and with the full assent of the defendants, and established their choice and election to avoid a sale and take their legacies in the land itself, instead of the proceeds, when they took possession of the property as their own and in accordance with the terms of the judgment. This they were at liberty to do, no other rights intervening or being prejudiced by the act. (*Hetzel v. Barber*, 69 N. Y. 1; *Prentice v. Janssen*, 79 id. 478.) It may very well be that, while this reconversion changed the defendants from legatees of money to devisees of land, the change did not divest the heirs-at-law of their legal title, and *ipso facto* transfer that title to the

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defendants, as might easily be held where the devisees and heirs-at-law were absolutely identical. But that inquiry need not be pursued. The legal title which descended was purely formal, utterly barren and naked, and the effect of defendants' election was, at least, to vest in them the equitable ownership of and the entire beneficial interest in the land, and enable them at any moment to require and compel from the holders of the formal title its complete transfer. The provisions of the Code, under which the liability of devisees arises (§ 1843), do not require as a condition that the legal title shall have passed. Such devisees are made liable "to the extent of the estate, interest and right in the real property which descended to them from, or was effectually devised to them by the decedent." There was such effectual devise to them of the entire beneficial interest in the land if they chose so to accept it. The donor must be understood to have given them that option (*Hetzel v. Barber, supra*), and they were at liberty to take, and could do so effectually, in the character of devisees. The real assault, therefore, upon the General Term opinion respects the proof of that election and is in the main concentrated upon the assertion that the defendants had not taken possession of the land after the judgment and as the owners, which that judgment declared them to be, and that the finding of the referee to that effect was entirely without evidence to support it. But the fact was admitted by the pleadings and not a controverted issue. The complaint alleged "that after the entry of said judgment, as aforesaid, the defendants in this action entered into possession of the aforesaid real estate, by themselves, their agents or lessees, and have ever since continued in such possession, and that they are still the owners of such real estate as such devisees thereof as aforesaid." The answer discloses no denial of the allegation. It asserts only that when the action was commenced "one Andrew McKelvey was in the possession and occupancy of the said real estate * * * under and by virtue of a lease made and executed to him by the said Robert Smith in his lifetime; that the term created by said lease

expired on the first day of April, 1875; that since the expiration of said lease the defendants, Jennie McKelvey and Esther McKelvey, have lived on the said premises." The answer further "admits the allegations in said complaint contained, which are consistent with the allegations herein contained in the first and second subdivisions of this answer." And so the averment of the complaint stands not only without denial but affirmatively admitted, for the alleged lease of McKelvey is said to have ended in April, 1875, and the judgment and entry of defendants did not occur until the next year. On the main question in the case, therefore, we are unable to see that the General Term opinion has been in any respect justly criticised.

Objection is made to the apportionment among the devisees which added to the share of two of them the proportionate part of legacies given to them in excess of their co-tenants. The consequent difference is so small as to be almost trifling, but it seems to us a sufficient answer that having chosen to take their entire legacies in land they became liable under the statute to the extent awarded so far as creditors were concerned, whatever may be their equities as against their co-tenants upon a partition.

A final claim is made that the courts below erred in not allowing an equitable offset founded upon the proof as to the delivery to Pridmore for safe-keeping of his own notes payable to the testator and of certain amounts of money belonging to him. It is not claimed that these items could be allowed as a legal offset or counter-claim, but that the court upon principles of natural equity may use them in reduction of plaintiff's demand. That power should be very cautiously exerted and only in a case where the equity invoked is entirely clear and certain. It is never justified save where other remedies are impossible and where the demand allowed is put beyond reasonable doubt. In the present case we do not even know that the plaintiff's notes were due and payable or drew interest. If not there is no equity in lessening his term of credit and compelling him to pay in advance of his contract.

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(*Lindsay v. Jackson*, 2 Paige, 581, 585.) It does not appear that the money deposited has ever been demanded, or that Pridmore is insolvent or that his debt, if it be one, may not be recovered. The facts shown raise rather a reasonable suspicion of a right than clear and controlling proof of its existence. It is not to such a case that the doctrine of natural equity should be applied.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.

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111	343
104	186
119	189
104	186
149	69

MARIE S. BREHM, Administratrix, &c., Respondent, v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Appellants.

By the judgment in an action for the foreclosure of a mortgage upon premises in the city of New York owned by G., plaintiff's intestate, the referee appointed to sell was directed to pay all assessments on the mortgaged premises out of the proceeds of sale. At the time of the sale there was an assessment on the premises for a local improvement, which the referee paid. This assessment was, on the application of G., subsequently vacated. In an action brought to recover back the amount paid, *held* that although the assessment was paid without the knowledge of G., yet as it was paid by order of the court, out of moneys belonging to him, and the court had power to direct the payment so long as the assessment was not vacated, and as its validity could not be determined in the foreclosure suit, the payment was equivalent to a collection from G. under process of law, and he was entitled to recover; also that it was not necessary, as a condition of recovery, to have the foreclosure judgment set aside or annulled; it was not the adjudication which created the apparent lien, or the authority upon which the right of the city, as between it and the property owner, to collect the assessment, depended.

The order vacating the assessment was granted December 4, 1871. Plaintiff presented his claim to the comptroller November 17, 1877, pursuant to the requirements of the city charter (§ 105, chap. 885, Laws of 1873) and this action was commenced December 18, 1877. The statute of limitations was pleaded as a defense, but the complaint was dismissed upon the trial wholly upon other grounds. *Held*, that the statute could not be invoked to sustain the dismissal, as, if error was committed in the ruling, it could not be cured by raising a question on appeal not raised

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on the trial; also, *held*, that the claim was not barred by the statute; that, as by the Code of Civil Procedure (§ 406), "when the commencement of an action has been stayed * * * by statutory prohibition, the time of the continuance of the stay is not a part of the time limited for the commencement of the action" and as by the city charter (§ 105) plaintiff was prohibited from bringing suit until after the lapse of thirty days from the presentation of the claim, the running of the statute was suspended during the thirty days.

Dickinson v. Mayor, etc (92 N. Y. 584) distinguished.

Also, *held*, that the question was not affected by the provision of said Code (§ 410), which declares that when a demand is necessary to entitle a party to maintain an action, the time within which the action must be commenced must be computed from the time when the right to make the demand is complete; that this provision only applies where an immediate right of action follows a demand.

It seems, the presentation of the claim, although a necessary preliminary to the bringing of a suit against the city, is not the commencement of an action or proceedings to collect the claim within the meaning of the statute of limitations.

(Submitted December 15, 1886; decided January 18, 1887.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department made March 8, 1886, which reversed a judgment in favor of defendant entered upon a decision of the court on trial without a jury. (Reported below, 30 Hun, 533.)

The nature of the action and the material facts are stated in the opinion.

David J. Dean for appellant. The action is barred by the statute of limitations. (Code of Proc. §§ 382, 410; *Meehan v. Mayor, etc.*, 28 Hun, 642; *Dickinson v. Mayor, etc.*, 92 N. Y. 584; *Fisher v. Mayor, etc.*, 67 id. 76; *Lyle v. Murray*, 4 Sandf. S. C. 590-595; *White v. Southland*, 2 Alb. L. J. 50, 51; *Palmer v. Palmer*, 36 Mich. 487; *Brust v. Barrett*, 16 Hun, 409; Code Civ. Proc. § 410; *Stafford v. Richardson*, 15 Wend. 302; *Lyle v. Murray*, 4 Sandf. 590; *Sweet v. Irish*, 36 Barb. 487; *Payne v. Gardiner*, 29 N. Y. 146.) The service of the demand upon the comptroller on the 17th of November, 1877, was not a commencement of the action. (Code, §§ 416, 398, 399.) The propriety of the payment cannot be questioned in this action. (*Embury v. Conner*, 3

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N. Y. 511; *Birckhead v. Brown*, 5 SALDf. 134; *Binck v. Wood*, 43 Barb. 315; *Homer v. Fish*, 1 Pick. 435; *Gordon v. Mayor, etc.*, 5 Gill [Md.], 231; *Homes v. Oregon, etc., Co.*, 9 Fed. R. 229; *Mutual L. Ins. Co. v. Wager*, 27 Barb. 354; *Mowatt v. Wright*, 1 Wend. 354; *Byrnes v. Stevens*, 4 Cent. R. 113.) The assessment was not paid by decedent under coercion of law. (*Homer v. Fish*, 1 Pick. 436; *Smith v. Lowery*, 1 Johns. Ch. 320; *White v. Ward*, 9 id. 231; *Gordon v. Mayor, etc.*, 5 Gill [Md.], 231; Freeman on Judgments [2d ed.], § 249; *Swift v. Poughkeepsie*, 37 N. Y. 514.)

Moody B. Smith for respondent. The money was paid before the vacation of the assessment, and while that remained in force the plaintiff was bound to pay and had no lawful mode of resisting such payment. (*Bk. of Comm. v. Mayor, etc.*, 43 N. Y. 184; *Peyser v. Mayor, etc.*, 70 id. 497.) The court will not review any question of fact raised in this case. (Code of Civ. Proc. § 1338; *Meyer v. Beach*, 79 N. Y. 409; *Van Tassel v. Wood*, 76 id. 614.) The question of the statute of limitations cannot be raised in this court because it was not taken advantage of at the trial, and there are no findings, or requests to find in regard to it. (*Stewart v. Morss*, 79 N. Y. 629; *Osgood v. Toole*, 60 id. 475.) The cause of action is not barred by the statute. (Code of Civ. Proc. §§ 410, 414, subd. 3.) Statutes *in pari materia* are to be taken together. (*Earl of Ailesburg v. Pattison*, Dong. 30; *Rogers v. Bradshaw*, 20 Johns. 735, 744; *Davidson v. Johnnette*, 7 Met. 393; *Lewis v. Webb*, 3 Grant, 326.)

RAPALLO J. This action was brought to recover money paid to discharge the lien of an assessment, which, after the payment, had been vacated by order of the Supreme Court.

The trial was before the court without a jury. The Court at Circuit dismissed the complaint. The General Term reversed the judgment of dismissal and ordered a new trial, and the present appeal is from the order of reversal.

The only ground stated on the motion to dismiss, was that there was no proof that the plaintiff ever paid the money.

The money was paid under the following circumstances. The land upon which the assessment was an apparent lien, was owned by Horatio N. Gray, the plaintiff's intestate, and was subject to a mortgage held by Edward Roberts. A judgment was entered for the foreclosure of this mortgage and the sale of the mortgaged premises by a referee, which judgment directed that all taxes and assessments upon the mortgaged premises be paid out of the proceeds of sale. Pursuant to this direction, the referee, out of the proceeds of sale, paid the assessment in question on the 6th of June, 1871. Gray was then, as the former owner of the equity of redemption, entitled to the surplus moneys which arose on such sale.

On his application, the assessment was vacated by order of the Supreme Court, dated December 4, 1871. This action was brought December 18, 1877.

It is apparent that the payment was made out of money belonging to the plaintiff's intestate, and we think this was equivalent to a payment by him. The payment does not appear to have been made with his consent. He was living at the time of the trial (the plaintiff's having been substituted after judgment) and testified that he was not aware of the fact, at the time, that the assessment was taken out of the surplus money. Having been paid out of funds belonging to him, and by order of the court, we think the payment was equivalent to a collection under process of law, and that on the subsequent vacating of the assessment he was entitled to recover the money so paid. So long as the assessment was not vacated, the court had power to direct its payment, and its validity could not be determined in the foreclosure action.

The trial court, in its opinion, placed the dismissal on the ground that the foreclosure judgment, under which the money was paid, had not been set aside or annulled. We concur with the opinion of the court at General Term that this ground is not tenable. The judgment of foreclosure was not the adjudication which created the apparent lien, nor the authority upon which the right of the city, as between it and the property or its owner, to collect the assessment,

depended. It established no right as between them, and there was consequently no necessity of setting it aside for the purpose of entitling the plaintiff to recover the money paid. It was simply the means by which the city was enabled to collect the void assessment.

On the appeal to the General Term the judgment of the trial court was sought to be sustained on the ground that the plaintiff's claim was barred by the statute of limitations. We agree to the conclusion of the General Term on this point, but not with the reasoning by which it was reached.

The General Term held that the presentation of the claim by the plaintiff to the comptroller on the 17th of November, 1877, pursuant to the requirement of section 105 of the charter of 1873 (Laws of 1873, chap. 385), the statutory limitation of six years not having expired at the time of such presentation, was the beginning of proceedings to enforce the claim, and, therefore, a *quasi* summons or legal process, and consequently that the service of the demand by the claimant within the period of six years after the claim arises must prevent the application of the statute to his prejudice.

We are unable to adopt this view. The presentation, although a necessary preliminary to enable a claimant against the city to maintain an action on his claim, is not the commencement of an action.

But there are other reasons which preclude the defendant from availing itself of the statute of limitations to sustain the judgment of dismissal.

In the first place, although the statute of limitations was set up in the answer, it does not appear to have been insisted upon, or even referred to, at the trial, but the motion to dismiss was placed and the dismissal was granted, wholly on another ground. If error was committed in this respect, it could not be cured by raising on the appeal another question which was not raised at the trial and to which, if it had been raised, there might possibly have been some answer.

But assuming the question to be before us, it is by no means clear that the plaintiff's claim was barred by the statute,

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Conceding that the statute began to run on the 4th of December, 1871, when the order, or judgment, vacating the assessment was dated, the period of limitation would have expired on the 4th of December, 1877, but for the provision of section 406 of the Code of Civil Procedure, which is, that "when the commencement of an action has been stayed by injunction or other order of a court, or judge, *or by statutory prohibition*, the time of the continuance of the stay is not a part of the time limited for the commencement of the action."

On the 17th of November, 1877, at which time the right of action was not barred, the plaintiff presented her claim to the comptroller. She would at that time have been entitled to commence her action, but for section 105 of the charter of 1873, which required her to wait until the comptroller had neglected for thirty days after such presentation, to pay her claim. That section in express terms prohibited her from maintaining any action until the lapse of the thirty days. We think that section 406 of the Code of Civil Procedure was framed to meet just such a case, and to suspend the running of the statute during the term of the statutory prohibition. This view is quite consistent with the case of *Dickinson v. Mayor, etc.* (92 N. Y. 584). In that case it would not have helped the plaintiff, the term of the statutory suspension being only thirty days, and the plaintiff having exceeded the statutory limitation more than one year, and the claim not having been presented to the comptroller until more than three months after the statutory limitation had expired. But here the action was brought on the 18th of December, 1877. The statutory limitation is claimed by the defendant to have expired the 4th of December, 1877. The excess was only fourteen days, and the operation of section 406 being to suspend the running of the statute during the thirty days following the 17th of November, 1877, when the claim was presented, the action was commenced in due time.

This construction also relieves the statutes from the apparent inconsistency pointed out in the opinion at General Term, of allowing a plaintiff six years within which to commence an

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action, and at the same time prohibiting him during thirty days of that term from maintaining any action.

Section 410 of the Code of Civil Procedure does not affect this question. It provides only for cases where a simple demand is a necessary preliminary to the bringing of an action, and the action may immediately follow a non-compliance with the demand. Its language is: "Section 410. Where a right exists, but a demand is necessary to entitle a person to maintain an action, the time within which the action must be commenced, must be computed from the time when the right to make the demand is complete, except in one of the following cases."

The exceptions have no reference to the question now under consideration. This section (410) applies to many cases where a demand is necessary, and an immediate right of action follows, but it could hardly apply to the case of a promissory note payable thirty days after demand. In the present case not only a demand was necessary, but a presentation of the claim and a neglect for thirty days to pay. The maintenance of an action before the expiration of the thirty days was prohibited, and the question is, whether under section 406, the statute ran during the thirty days.

The order of the General Term should be affirmed and judgment absolute rendered against the defendant on its stipulation, with costs.

All concur.

Order affirmed and judgment accordingly.

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124	548

In the Matter of the Claim of BETSEY B. WILBUR, Respondent, v. the Estate of ENOS WARREN, Deceased.

An executory covenant, supported only by a meritorious, as distinguished from a valuable or pecuniary consideration, cannot be enforced either at law or equity.

One who purchases land, subject to a mortgage, makes the land thereby the primary fund for the payment of the mortgage debt, and this is so, although the deed contains a covenant on the part of the grantee to

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pay the mortgage debt. The covenant is to indemnify the grantor against the contingency that the land may not bring enough to pay such debt.

W. purchased certain real estate, subject to a mortgage thereon, which by his deed he assumed and agreed to pay. He conveyed the land to his daughter by deed containing full covenants, in which no reference was made to the mortgage. The only consideration for the deed was natural love and affection. W., after the conveyance, paid part of the mortgage. The daughter, after his death, paid interest on the balance and for the amount so paid presented a claim against his estate. *Held*, that the land was the primary fund for the payment of the mortgage, and the daughter took it subject to that burden; that the covenants in the deed were invalid and W. incurred no obligation, legal or equitable, to pay the mortgage in exoneration of the land; and that, therefore, the claim was improperly allowed.

Cole v. Malcolm (66 N. Y. 863) distinguished.

In re Wilbur v. Warren (40 Hun, 203) reversed.

(Submitted December 15, 1886; decided January 18, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department entered upon an order made April 17, 1886, which affirmed a decree of the surrogate of Chautauqua county, allowing a claim of Betsey B. Wilbur, administratrix of the estate of her father, Enos Warren, deceased, against said estate. (Reported below, 40 Hun, 203.)

The material facts are stated in the opinion.

Frank W. Stevens for appellant. The consideration of love and affection will not support an executory contract. (2 Kent's Com. 465; *Pearson v. Pearson*, 7 Johns. 26; *Fink v. Cox*, 18 id. 145; *Harris v. Clark*, 3 N. Y. 93; 2 Barb. 101; *Phelps v. Phelps*, 28 id. 121; *Craig v. Craig*, 3 Barb. Ch. 115; *Anthony v. Harrison*, 12 Hun, 198.) The right of subrogation does not arise until the demand to which subrogation is claimed has been actually paid by the one seeking to assert such right. (Sheldon on Subrogation, § 127; *Glass v. Pullen*, 6 Bush. [Ky.] 346; *Penn. Bk. v. Patius*, 10 Watts, 148; *Conway v. McCowan*, 53 Ill. 363; *Darst v. Bates*, 51 id. 439; *Gillian v. Esselman*, 5 Sneed. 86; *McConnell v. Beattie*, 34 Ark. 113; *Bridges v. Nicholson*, 20 Ga. 90;

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Magee v. Leggett, 48 Miss. 139; *Comm. v. Canal Co.*, 32 Md. 501; *Kyner v. Kyner*, 6 Watts, 221; *Banks v. Benedict*, 15 Conn. 437; *Nield v. Hamilton*, 45 Vt. 35; *Vert v. Voss*, 74 Ind. 566.) No personal claim exists against Warren in favor of the mortgagee. (*Vrooman v. Turner*, 69 N. Y. 280; *Dunning v. Leavitt*, 85 id. 30.) The doctrine of subrogation is that, when one has been compelled to pay a debt which ought to have been paid by another, he is entitled to a cession of all the remedies which the creditor possessed against that other. (Sheldon on Subrogation, §§ 2, 11; *Mathews v. Aiken*, 1 N. Y. 605; *In re Hewitt*, 25 N. J., Eq. 210; *Hoover v. Epler*, 52 Penn. St., 522; *Hamsburger v. Lancey*, 33 Grat. 527; *Cheeseborough v. Millard*, 1 Johns. Ch. 409; 1 Story's Eq. Juris., § 493; *Gans v. Thieme*, 93 N. Y. 232; *McCormick v. Irwin*, 35 Penn. St., 111, 117; *Heart v. Bryan*, 2 Dev. Eq. 147; *Acer v. Hotchkiss*, 97 N. Y. 402.) If the purchaser of mortgaged premises assumes the payment of the mortgage debt, the land is the primary fund of payment. (Thomas on Mortgages, 92; *Rubens v. Prindle*, 44 Barb. 336; *Russell v. Pistor*, 7 N. Y. 144; *Halsey v. Reed*, 9 Paige, 446.) If a surety is himself indebted to his principal against whom he asks to be subrogated, it will not be allowed to him without his first satisfying that debt. (*Coate's Appeal*, 7 Watts and Serg., 99.)

A. Hazeltine for respondent. The gift was of the land free and clear of all incumbrances, as the donor stated it to be in his deed, and the meritorious consideration was sufficient. (*Hunt v. Johnson*, 44 N. Y. 27; *Bucklin v. Bucklin*, 1 Abb. Ct. App. Dec. 1 Keyes, 146.) The land being but surety for the mortgage and the claimant being seized of it, subject to the lien of the mortgage, and having been compelled to pay the interest which became due, she is entitled to be subrogated to the rights and remedies of the mortgagee and should be allowed this claim. (*Barnes v. Mott*, 64 N. Y. 397, 402; Thomas on Mortgages, 92, 94; *Wadsworth v. Lyon*, 93 N. Y. 201; *Cole v. Malcolm*, 66 id. 363.)

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ANDREWS, J. The General Term sustained the decree of the surrogate, allowing the claim of Betsy B. Wilbur against the estate of her father, Enos Warren, for the amount of interest paid by her on the mortgage executed by her husband, Riley Wilbur, to Mary D. Miller, on the land subsequently conveyed by the mortgagor to Enos Warren, and by him to his daughter, on the ground that it was paid on his debt to protect her title to the land.

The facts may be briefly stated. In 1866, the land now owned by the claimant being a farm of about ninety acres, was purchased by and conveyed to Riley Wilbur. On the 2d of May, 1876, Riley Wilbur and his wife executed to Mary D. Miller a mortgage thereon for \$2,400 to secure the bond of Riley Wilbur, executed concurrently therewith. On the 5th of June, 1879, Wilbur and his wife conveyed to Enos Warren seventy acres of the land, subject to the mortgage, "which mortgage, with the bond accompanying it," the grantee in and by the deed agreed to pay as a part consideration for the conveyance. On the same day Warren acquired title to the other twenty acres from one Blauvelt, to whom Wilbur had previously conveyed it. On the 2d of December, 1880, Enos Warren, then of the age of 79 years, conveyed the ninety acres to his daughter, Betsy B. Wilbur, by deed expressing the consideration of \$500, with full covenants, and containing no reference to the mortgage. After Enos Warren acquired title, and before his conveyance to his daughter, he paid \$1,400 on the mortgage, and at the time of his death in October, 1881, there was \$1,000 of principal unpaid. The interest paid by Mrs. Wilbur for which she claims reimbursement, accrued after the death of the intestate. He left surviving him the claimant, a son, and the children of a deceased daughter, his only next of kin and heirs-at-law. In fact, there was no pecuniary consideration for the conveyance to Mrs. Wilbur, the only consideration being natural love and affection. Upon these facts the question arises whether there is any ground, legal or equitable, for charging the estate of

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Enos Warren on account of the interest paid by Mrs. Wilbur on the Miller mortgage.

It is conceded by the General Term that the claimant has no remedy upon the covenants in her deed. It seems to be the general doctrine that an executory agreement supported only by a meritorious, as distinguished from a valuable or pecuniary consideration, cannot be enforced either at law or in equity, and an executory covenant falls within the operation of the rule. The leading cases on this subject are cited in *Whitaker v. Whitaker* (52 N. Y. 368). The claim of Mrs. Wilbur to be indemnified out of the estate of her father for payments made by her on the mortgage, cannot therefore be supported upon the basis of any contract between herself and him, by which he obligated himself to pay the mortgage. It is clear that if she had brought an action upon the covenants in her deed, against the personal representatives of her father, to recover the money paid by her, she must have failed. It would have been a conclusive answer to the suit that the covenant was without adequate consideration, and imposed no legal obligation on the covenantor to discharge the mortgage. It remains therefore to consider whether, independently of any contract between the parties, the intestate, nevertheless, by reason of the facts and circumstances disclosed, made the mortgage debt his own, so as to render his personal estate primarily chargeable with its payment in exoneration of the land. If this was the effect of the transactions, and the land in the hands of the claimant stood as between her and her father, as security merely for his debt, then it may properly be conceded that she would be entitled to be reimbursed out of the intestate's estate, for any payments on the mortgage made to protect her title. If, on the other hand, as between her and her father, the land was the primary fund for the payment of the mortgage, then it would seem to follow that no recourse could be had to his estate for payments made by the daughter thereon. The payments in that case would be payments made for her own benefit upon a debt against the land, the liability of the grantor on

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his covenants in his deed from the mortgagor, being secondary only.

It is the settled doctrine in equity that one who purchases land subject to a mortgage makes the land thereby the primary fund for the payment of the mortgage debt. It is otherwise as between mortgagor and mortgagee when the bond of the mortgagor accompanies the mortgage in the absence of any statute regulation. In that case the bond is the principal thing and the mortgage is the incident. The debt is represented by the bond, and the mortgage is a collateral security for the personal obligation. But on a conveyance by the mortgagor subject to the mortgage, the plain meaning of the transaction between the parties is that the land shall pay the mortgage debt in exoneration of the personal liability of the mortgagor on his bond, and in equity on such a conveyance, the land is treated as the principal debtor, and the mortgagor as surety for the mortgage debt. If the deed in addition contains a covenant on the part of the grantee to pay the mortgage, the land still remains the primary fund for the payment of the mortgage. This question was very fully considered upon authority by the chancellor in the case of *Cumberland v. Codrington* (3 J. Ch. 229) and he declared the result of the authorities to be that "the mere covenant with the vendor to pay the mortgage debt does not shift the charge from the fund primarily liable." This is in accordance also with the real intent of the transaction. The essential purpose of such a covenant is to indemnify the mortgagor against the contingency that the land may not bring enough to pay the mortgage debt and thereby leave him exposed to a claim for a deficiency. (*Halsey v. Reed*, 9 Paige, 446.) Although the covenant may be in the form of a direct undertaking to pay the mortgage debt, and not a mere covenant of indemnity, yet that is its essential character. The covenant is treated as an additional security for the mortgage debt, and inures as a promise to the mortgagee, yet it is settled that it will support an action by the mortgagee only when the

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immediate grantor of the covenant is himself liable for the mortgage debt. (*King v. Whiteley*, 10 Paige, 465; *Vrooman v. Turner*, 69 N. Y. 280.) In *Halsey v. Reed* the grantor of premises, subject to a mortgage which was assumed by the grantee before making any payment thereon, brought an action against the covenantor on the covenant of assumption and recovered nominal damages only. He afterwards paid the mortgage and claimed the amount of the payment from the estate of his grantee. It was insisted that the former judgment was a bar, as the claimant might have recovered the whole amount of the mortgage in that action. But the point was overruled, the chancellor holding that until actual payment only nominal damages could be recovered. But even if the grantor could, on default of the grantee to perform his covenant to pay the mortgage, recover the whole amount thereof without having paid it himself, yet he would be bound to apply the sum recovered in satisfaction of the mortgage debt. Whichever view may be taken, the fact remains that indemnity is the primary purpose of such a covenant. Can it be doubted that, where the grantor is not himself liable for the mortgage debt and has no personal interest that the covenant shall be performed, he can recover nothing beyond nominal damages. The giving of a covenant by the grantee does not work a novation of the mortgage debt. It does not make the debt his own, except in respect to the estate (*Butler v. Butler*, 5 Ves. 534), and his liability is auxilliary and not primary. We think, therefore, there can be no doubt upon the authorities that when Enos Warren conveyed the mortgaged premises to his daughter the land was the primary fund for the satisfaction of the mortgage.

The remaining question is, whether the burden was shifted by the circumstances attending the conveyance to Mrs. Wilbur, rendering that which before was primarily a debt against the land, to which his covenant was collateral, his personal debt, to which the mortgage was incident. It was doubtless competent for the intestate upon a consideration to

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change his position, and as between his daughter and himself, to make himself the principal debtor and the land the secondary fund for the payment of the mortgage. This probably would have been the effect of the covenants in his deed, except for their invalidity. It is said that the insertion of the covenants in the deed, although not enforceable as such, indicates an intention on the part of the father to himself pay the mortgage. The circumstances do indicate an intention on the part of the grantor to give the land to his daughter free from incumbrance. But this intention was never effectuated. The father died leaving the mortgage unpaid. The question is whether the existence of this unexecuted intention is sufficient in law or equity to shift the primary burden of the mortgage debt from the land and put it upon the father's estate. To hold this would, we think, be introducing a dangerous doctrine which, so far as we know, has no sanction in the law. The father incurred no legal or equitable obligation to pay the mortgage in exoneration of the land. The daughter took the land charged with the mortgage, and if she pays it out of her own means nothing is taken from her which her father had given her. If, on the other hand, the estate of the father is compelled to pay the mortgage she, in effect, is enabled to perfect an unexecuted gift to the prejudice of others interested in the estate. It may be admitted that, in a loose sense, there is an equity that her father's intention should be carried out, but an intention, not moved by any consideration recognized by the law as sufficient to create an enforceable obligation, is not, we think, sufficient to change the natural order of liability, as between the real and personal estate, in respect to an obligation, which, when created, was secondary and not primary. The intention of the father rested in intention merely, because no effectual act was done in execution of it. The case of *Cole v. Malcolm* (66 N. Y. 363) is not in point. There, lands conveyed by a husband to his wife, without consideration, were subsequently subjected to a charge in favor of creditors, which the heirs of the wife were compelled to

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pay, and the court held they were entitled to be subrogated to the claim of the creditors against the husband. In that case there was a gift of land, unincumbered, without actual fraud, perfected by a conveyance, and in effect a portion of it was subsequently taken away through a latent equity in the creditors of the husband. The cases are quite dissimilar and do not rest on the same principle.

These views lead to a reversal of the judgment of the General Term, and of the decree of the surrogate, with costs to the executors out of the estate.

All concur.

Judgment and decree reversed.

In the Matter of the Estate of EDWIN GILBERT, Deceased.

An order of a surrogate, adjudging against the denial of an administrator, that there are assets of the estate in his hands, and requiring him to account therefor, is an order affecting a substantial right, and so is appealable to the General Term. (Code of Civil Procedure, § 2570.)

It is not essential to such an appeal that the order be a "final" one, as is requisite to authorize a review thereof in this court. (§ 190.)

Where the mortgage of a third person has been assigned by the mortgagee as collateral for his own debt, the foreclosure of the mortgage and purchase at the foreclosure sale by the assignee, as against the assignor, where the latter is not made a party to the foreclosure and his equitable right foreclosed, simply substitutes the land for the mortgage and the assignee holds it as a security merely, subject to the right of the assignor to redeem by payment of the debt, and upon such payment he is entitled to the land.

Bloomer v. Sturges (58 N. Y. 168) distinguished and limited.

The doctrine of merger does not apply in such case, as in equity merger will never be allowed against the interest of the parties or their obvious intention, or where the two estates are held in different rights.

T. applied to G. and two others for a loan to a corporation. This they refused, but an agreement was made, under which they loaned the money to T., taking his notes therefor. T. loaned the money to the corporation, taking its notes therefor, corresponding in the times of payments and amounts with those given by T. which were secured by mortgage on real estate of the corporation; these were assigned by T. as security for the loan. G. died and T. was appointed one of his administra-

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tors. He subsequently received another mortgage from the corporation on other lands, which he also assigned as collateral for the loan. This last mortgage was foreclosed by advertisement by the two surviving assignees and the administrators of G. The premises were bid off by the administrators, who, however, paid no money on the purchase. The interest of G. in the notes given by T. was set forth as assets in the inventory of his estate, and on final settlement of the accounts of the administrators, it appeared that such interest had been paid in full by T. and the accounts were so settled. Subsequently, the administrators joined in a deed of the said premises to a son of T., who conveyed the same to his father. In proceedings to compel T. to account, as administrator, for the proceeds received by him on sale of said lands, *held*, that on payment of the debt to the estate, T. was entitled to the land; that the fact that, as administrator, he was party to the foreclosure did not affect his equities; and that, therefore, he could not be compelled to account for such proceeds.

It was claimed that by the agreement of the parties the estate was entitled to a greater rate of interest than was called for by the notes, or was accounted for by the administrator. *Held*, that such a claim could not survive the settlement of his accounts, as it should then have been asserted.

(Argued December 15, 1886; decided January 18, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 5, 1886, which reversed a decree of the surrogate of the county of Ontario, requiring George Thayer, as surviving administrator of the estate of Edwin Gilbert, to render a further account, particularly as to the proceeds arising from the sale by him of certain real estate. (Reported below, 39 Hun, 61.)

In 1859, said Thayer applied to Gideon Pitts, Perez R. Pitts and said Gilbert to make a loan to the Little Falls Manufacturing Company, a Minnesota corporation, this they declined to do, but an arrangement was made by which they loaned \$3,000, taking the notes of Thayer, one for \$1,000, dated October 1, 1859, payable two years from date, and one for \$2,000, dated November 1, 1859, payable three years from date. The corporation executed to Thayer its notes corresponding in amount, date and time of payment secured by a

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mortgage on real estate in Minnesota, situate on the east side of the Mississippi river. These notes and the mortgage Thayer assigned to the Messrs. Pitts and Gilbert as collateral security for his notes. The assignment provided that on the full payment of said notes it was to be void and of no effect. Mr. Gilbert died intestate in April, 1861. In November, 1861, the said company executed to Mr. Thayer another mortgage on other lands owned by it situate on the west side of the Mississippi river to secure its note for \$1,000, which was given for \$500, money loaned, the balance for interest unpaid on the old notes. In August, 1862, Thayer assigned this note and mortgage to the Pitts and the administrators of the estate of Gilbert as further security for the said notes; the assignment containing provisions similar to those in the first assignment. In December, 1862, proceedings were instituted in the names of the Messrs. Pitts and of the administrators of the estate of Gilbert to foreclose the last mortgage by advertisement under the laws of the State of Minnesota, and upon sale the property was bid off by said administrators. No money, however, was in fact paid by them. The administrators assigned their interest in the other mortgage to the Messrs. Pitts, who foreclosed the same by action in 1863, and on sale in January, 1864, Thayer purchased the mortgaged premises. In the inventory of the estate of Gilbert his one-third interest in the three notes given by Thayer was entered, but no mention was made of the notes or mortgages given by the corporation. On final settlement of the accounts of the administrator, it appeared that Thayer had paid his notes in full and he was credited with the interest of the estate therein. In May, 1864, the administrators deeded the lands so bid in by them to a son of Mr. Thayer, who conveyed the same to his father. No consideration being paid for either conveyance. Mr. Thayer subsequently sold the premises for \$37,000. Other facts appear in the opinion.

E. G. Lapham, for appellants. The property sold to the administrators on the 16th day of February, 1863, became

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the property of the estate and should have been sold and accounted for as such, and the proceeds of the recent sales are assets in the hands of the respondent, for which he is liable to account. (*Valentine v. Belden*, 20 Hun, 537; Redf. on Surrogates, 502, 505; *Lockman v. Reilly*, 95 N. Y. 64; Code of Civ. Pro. § 2472, subd. 3; *Clark v. Clark*, 8 Paige, Ch. 152; *Stiles v. Burch*, 5 id. 135.) The order of the surrogate that the respondent render a further account as administrator is not appealable at this stage of the proceeding. It is an interlocutory order, and the questions which naturally and properly arise can only be determined when a final decree or judgment shall have been made by the surrogate fixing the liability of the respondent to the petitioners. (Code of Civ. Pro., §§ 2570, 2717, 2718, 2723; *Hurlburt v. Durant*, 88 N. Y. 122; *Riggs v. Cragg*, 89 id. 479; *In re Halsey*, 93 id. 48.) The respondent, after the foreclosure of the mortgage on the west side of the river, and the purchase by him, as administrator of the premises, embraced therein for a less sum than was due the estate, could not by his voluntary act change the title to himself as an individual or pay the debt satisfied by the sale. (*Hawks v. Hincheliff*, 17 Barb. 492; *Prouty v. Eaton*, 41 id. 409; *Hood v. Adams*, 124 Mass. 481; *Barnard v. Onderdonk*, 98 N. Y. 158; *Michoud v. Girod*, 4 How. [U. S.] 503; *Scholle v. Scholle*, 101 N. Y. 167; *Slee v. Manhattan Co.*, 1 Paige, 48; *Dalton v. Smith*, 86 N. Y. 183; *Hoyt v. Martense*, 16 id. 231; *Bloomer v. Sturges*, 58 id. 168; Wiltsie on Foreclosure, §§ 14, 15, 78; *Carpenter v. O'Dougherty*, 67 Barb. 397; Colebrook on Collateral Securities, 181.) It was the duty of the respondent to have included in his inventory the collateral securities, and to have embraced in his account rendered a statement of what had been done with them. (*In re Butler*, 38 N. Y. 397; *Griffith v. Godey*, 113 U. S. Sup. Ct. 89.) No statute of limitations began to run against the petitioners until they were notified of the facts. (Code, §§ 382, 410; *Drake v. Wilkie*, 30 Hun, 537; *Reitz v. Reitz*, 80 N. Y. 538; *Ferris v. Van Vechten*, 73

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id. 113; *Carr v. Thompson*, 87 id. 160; *Wood v. Rusco*, 4 Redf. 380; *Decouche v. Savetier*, 3 John. Ch. 190; *Robinson v. Robinson*, 5 Lans. 169; *Bronson v. Munson*, 29 Hun. 54; *Griffith v. Godey*, 113 U. S. 89; *Price v. Mulford*, 36 Hun. 247; *People v. Open Board*, 92 N. Y. 104; *Phillipi v. Phillipi*, 115 U. S. 151; *Oliver v. Pratt*, 3 How. [U. S.] 333; *Meade v. Norton*, 11 Wall. 442.) As the respondent by his acts and admissions has invited this investigation, he should pay costs in case of reversal, but in no event should the petitioners be subjected to costs. They rest entirely in the discretion of the court. (Code, §§ 2558, 2589; *Pattison v. Hull*, 9 Cow. 747; *Van Riper v. Popenhausen*, 43 N. Y. 68; *Kreitz v. Frost*, 55 Barb. 474; *Phelps v. Wood*, 46 How. Pr. 1.)

William F. Cogswell for respondent. The decree of the surrogate was appealable and the appeal brought up for review the decision upon which it was based. (Code Civ. Proc. §§ 2550, 2568, 2570; *Fiester v. Shephard*, 26 Hun. 183; S. C., 92 N. Y. 251.) Having paid the debt of his principal, Mr. Thayer was entitled to all the securities held by the creditor and to be subrogated to his right thereto. This right of subrogation does not rest upon the contract relation of the parties, but upon general principles of equity. (*Matthews v. Aiken*, 1 N. Y. 595; *Corey v. Leonard*, 56 id. 494; *First Nat. Bk. v. Wood*, 71 id. 405; *Torrens v. Whitney*, 75 id. 425.) The administrators of the estate of Edwin Gilbert, deceased, held the land after the foreclosure as collateral security for the notes of Mr. Thayer the same as they held the mortgage before the foreclosure, and not otherwise; and upon the payment by Mr. Thayer of his note to the estate he was entitled to have his land restored to him. (*Slee v. Manhattan Co.*, 1 Paige, 48; *Hoyt v. Martense*, 16 N. Y. 231; *Dalton v. Smith*, 86 id. 176; *Case v. Carroll*, 35 id. 385; *Terrett v. Crombie*, 6 Lans. 82; S. C., 55 N. Y. 683; *James v. Morey*, 2 Cow. 246; *Day v. Mooney*, 6 T. & C. 382; *Franklin v. Hayward*, 61 How. 43; *Smith v.*

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Roberts, 62 id. 196; *Benedict v. Holliday*, 3 Week. Dig. 420; *Smith v. Holbrook*, 1 Sheld. 474; S. C., 82 N. Y. 562; *Lisle v. Herbs*, 25 Hun, 485.) The proceedings were barred by the statute of limitations. (*Miner v. Beekman*, 50 N. Y. 337; *Hubbell v. Sibley*, id. 468; *Hubbell v. Medbury*, 53 id. 98; *Humbert v. Trinity Church*, 24 Wend. 587; *Foot v. Farrington*, 41 N. Y. 164; *Carr v. Thompson*, 87 id. 160, 164; *In re Cole*, 34 Hun, 320.) The decree of the surrogate on the judicial settlement of the account of the administrators of Mr. Gilbert was conclusive evidence of the payment of all indebtedness from Thayer to the estate. (*Stiles v. Birch*, 5 Paige, 132; *Churchill v. Prescott*, 3 Bradf. 233; *Gill v. Brower*, 37 N. Y. 549, 551, 552.) The surrogate had no jurisdiction of the subject of this inquiry (*Fulton v. Whitney*, 66 N. Y. 548; *Bevan v. Cooper*, 73 id. 317, 327; *Seaman v. Whitehead*, 78 id. 306; *Hurlburt v. Durant*, 88 id. 121; *Fiester v. Shephard*, 92 id. 251.)

FINCH, J. The order of the surrogate directing the defendant to account for the proceeds of the land in controversy was appealable to the General Term, and that tribunal did not err in reversing the judgment instead of dismissing the appeal. Such an appeal is permitted where the order "affects a substantial right." (Code Civ. Pro., § 2570.) It need not be a "final" order as becomes an essential inquiry when the jurisdiction of this court is invoked (*In re Halsey* 93 N. Y. 48), but whether such or not, is subject to review by the General Term if it involves a substantial right. That was the character of the order appealed from. It went beyond a mere direction to account where assets are admitted and their amount is the sole controversy, and adjudged, against the defendant's denial, that there were assets and settled the only substantial point of the litigation except the amount of damages to be awarded. In *Fiester v. Shephard* (26 Hun, 183; 92 N. Y. 251), there was an order to account which the General Term reversed, and which we deemed appealable. That order determined the disputed right of the petitioner under the will and so

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involved a substantial right of each party to the controversy

The main question involved in the appeal was carefully considered by the General Term, and, but for its interest and importance, and the alleged doubt clouding the opinions of this court upon the subject, might justly be allowed to rest upon the argument which prevailed with that tribunal.

It is quite necessary at the outset to clear the facts of a possible ambiguity. The contention of the appellants depends largely upon the theory that Gilbert stood as creditor of the Little Falls Company for a loan of \$1,000, secured by a mortgage of that company upon the land in controversy, and Thayer was simply a guarantor of that loan in consideration of a certain proportion of a large rate of interest agreed to be paid. If that was the conceded situation, it is not impossible that the doctrine of subrogation might reach far enough to leave us still confronting the question principally discussed, but we need not pursue that inquiry since we are thoroughly satisfied that the case must stand upon a different relation of the parties which was deliberately fixed and chosen by themselves.

Three persons, Gideon Pitts, Perez R. Pitts and Edwin Gilbert, the defendant's intestate, loaned to George Thayer, the defendant, \$3,000, taking his two notes, one for \$1,000, dated October 1, 1859, payable in two years with interest. and one for \$2,000, dated November 1, 1859, payable in three years from date with interest. It is undoubtedly true that Thayer borrowed this money to lend it in turn to the Little Falls Company. He had made application for a loan to that corporation which the lenders had refused, but at the same time intimating a willingness to take him as their debtor for the amount. This fact the surrogate expresses in his second finding in a somewhat ambiguous form, but not at all inconsistent with the further facts which he finds and with the papers executed to carry out the arrangement. The original proposition for a loan to the company was for \$5,000. This, the surrogate says was refused, but he adds that the lenders "were willing to loan the sum of \$3,000; *provided* the s

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Thayer would guarantee, *or become responsible for the same.*" How that responsibility was to be assumed or what form it should take, the surrogate does not determine, except as he finds the form that it *did* take, and that form is a direct loan to Thayer in the first instance, making him the primary and sole debtor to the lenders, and leaving him to deal with the corporation as he pleased, save that the finding may leave room for a possible inference that if Thayer secured on his loan to the corporation an interest of fifteen per cent, he should allow to the lenders an interest of ten per cent. The defendant made such loan, and took from the Little Falls Company their notes corresponding with those given by Thayer to his creditors in dates and amounts and periods of maturity, but providing for interest at fifteen per cent, payable semi-annually. These notes were secured by the company's mortgage to Thayer of their real estate on the east side of the river, dated two days earlier than the date of the October note. There the matter rested, with the rights and relations of the parties thus fixed, for a period of more than four months. On the 4th of February, 1860, Thayer assigned his notes and mortgage against the company to his lenders as collateral security for his own debt to them. The assignment is in writing, and is proved to have been prepared by Gilbert and written by him. There is no room for misunderstanding the fact it establishes. It recites the debt of Thayer to the original lenders, describing by dates and amounts the notes he had given, and transfers as security for that debt the mortgage and notes of the company, expressly providing that on payment of his own notes the assignment should be void and of "none effect." It is not possible in the face of this deliberate instrument, in the handwriting of Gilbert himself, to transform the declared relation into a primary indebtedness of the corporation to him and his associates, simply guaranteed by Thayer, and there is no equity in this claim, which has slept for almost a quarter of a century until changing values have given it great value, such as to justify a struggle to turn it into something different from the form which it deliberately assumed. In May,

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1861, Gilbert died and Thayer and the widow became administrators of his estate. In the inventory which they filed no mention is made of the Little Falls Company's notes and mortgage, but the debt of Thayer to Gilbert is included. In the original loan of \$3,000, each of the three parties furnished one-third and Thayer's debt to the amount of \$1,000 was the property of Gilbert. We find in the inventory accordingly one-third of the note of October, 1859, and one-third of that of November, 1859, credited to the estate as assets and due to the estate from Thayer. There was a third note of earlier date for \$224.09, inventoried as due from him. The final settlement of the accounts shows that all three notes were paid to the estate, the one last mentioned in 1862, and the other two May 30, 1863. Soon after the death of Gilbert the Little Falls Company gave to Thayer another mortgage, but upon its property on the west side of the river, dated November 26, 1861, and conditioned to secure the payment of \$1,000 in one year with interest at twelve per cent, payable semi-annually. The consideration of this mortgage was a new loan to the company by Thayer to about one-half of the amount, the remaining half securing arrears of interest on the existing debt to him, and this, the west side mortgage, was assigned to the three creditors of Thayer as collateral security for his debt to them precisely in the same manner as the first, or east side mortgage. These transfers, in legal effect, were each a mortgage of a mortgage or a pledge of a mortgage. The assignees got only a defeasible title, subject to destruction by the payment of the debt at any time before the rights of the assignor were foreclosed or extinguished. Both mortgages were foreclosed and on a sale the lands were purchased by the administrators of Gilbert. The second or west side mortgage was foreclosed by advertisement, the two Pitts and the representatives of Gilbert appearing as mortgagees, the sale taking place February 16, 1863, and under the law of Minnesota one year thereafter being allowed for redemption by the mortgagor, in default of which the equity became extinct. The east side mortgage was foreclosed by a suit in equity in the name of

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the Pitts, as plaintiffs, to whom for convenience the right of the estate had been transferred, but to neither foreclosure was Thayer a party in his individual character. In the equity suit he was not a party in any capacity and in the foreclosure by advertisement he is affected no further than his action as a foreclosing mortgagee as administrator of the Gilbert estate would involve.

The property now in controversy is that covered by the second or west side mortgage, and, after the payment by Thayer of his debt to the estate, was conveyed by him, as administrator, and by Mrs. Gilbert, as administratrix, to a third person, who in turn conveyed it to Thayer, who has since sold it for large sums. Are those proceeds his own, or do they constitute assets in his hands belonging to the estate of Gilbert?

Necessarily they must belong to either the assignor or assignee, for by the foreclosure the equity of the mortgagor was effectually cut off and destroyed. The claim of the assignee is founded upon the purchase under that foreclosure, by the administrators of Gilbert, and is that an absolute title passed to the estate which was not and could not be transferred by the deeds to Thayer, and so the lands are to be treated as personal assets and accounted for to the next of kin.

Two cases have substantially determined, as the doctrine of this court, that where the mortgage of a third person has been assigned by the mortgagee as collateral security for his own debt, the foreclosure of that mortgage by the assignee and his purchase at the sale, as against the assignor, work no other result than to substitute the land for the mortgage in the hands of the assignee, and to leave it subject to the assignor's right by payment of the debt to reclaim and hold his own property discharged of the assignee's lien upon it. (*Slee v. Manhattan Co.*, 1 Paige, 48; *Hoyt v. Martense*, 16 N. Y. 231.) Of course these cases assume that upon the foreclosure the equitable right of the assignor was not involved by making him a party and foreclosing such right, but deal with the result where the right survives the foreclosure; and

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they were subsequently criticised by suggestions to which our attention is invited. (*Bloomer v. Sturges*, 58 N. Y. 168.) In that case the court held that the assignor, defendant, was so made a party defendant in the foreclosure action, that its equity, as well as that of the mortgagor, was involved in the judgment and extinguished by the sale. Of course that ended the inquiry, and any discussion of what would have been the rights of the Ocean Bank, if not involved in the action, was needless and valuable only as a caution. That caution becomes applicable upon the facts before us and makes it prudent to take the measure of its just force.

The opinion of JOHNSON, J., points out that in *Hoyt v. Martense* the debt of the assignor, to which the assignment of the mortgage was collateral, was not yet due, and so the foreclosure was conducted in the names of both assignor and assignee, and for the understood purpose of cutting off the equity of the mortgagor without affecting the relations of the plaintiffs between themselves. In the case before us that difficulty did not exist, for Thayer, as an individual and as an assignor, was not a party at all and his personal rights not thereby involved or imperilled. The opinion again shows that in *Slee v. Manhattan Company* the foreclosure was by advertisement and did not and could not affect any one but the mortgagor of the land, and those claiming under him as owner of the equity of redemption or by a right subsequent to the mortgage, and was declared to leave untouched the right of the assignor as completely as if the foreclosure had been by an action in equity to which the assignor was not made a party. So far the comments of the court upon the two authorities bore upon the case then in hand and served to show that it stood outside of their scope and range. But then followed a suggestion throwing doubt upon their doctrine where the assignor's right remained. The learned judge conceded that right but questioned only its extent, and doubted whether the equity of the assignor extended to the land itself or merely to a lien for the definite sum of the debt secured by the mortgage. No such doubt remains in our minds. In

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Dalton v. Smith (86 N. Y. 176) we held that the right of the assignor attached to the land if the assignee became purchaser, and to the purchase-money if the title went to a stranger. In that case the appellant's points cited *Bloomer v. Sturges* as having effectually shaken the previous authorities. Our opinion then was, and still remains, that the assignment is in substance a mortgage or pledge of the transferred security; that it gives to the assignee merely a defeasible title, which ends upon payment of the debt, leaving the ownership in the assignor precisely as if no transfer had been made; that such defeasible title cannot be changed or enlarged, as against the assignor, by any act or dealing of the assignee, or his representatives, to which the assignor is not in some manner a party; that if the assignee forecloses the mortgage without also foreclosing the assignor's right, and becomes a purchaser at the sale, he holds the land as a substitute for the mortgage and precisely as he held the latter, and by no other, or different, or stronger title; and that whatever of benefit results from extinguishing the mortgagor's equity inheres in the security assigned in its changed form and goes of necessity to him who resumes his ownership by payment of the debt. The sale to the assignee, freeing the property from the mortgagor's equity, affected the relations of both assignor and assignee with the original mortgagor, but not at all their relations with each other. The security was thereby strengthened and made more valuable but remained a security still, and held by the same defeasible title and upon the same conditions as at first. That is not only the logical but the just view of the transaction. The assignee gets exactly what he bargained for, and what is his of right. While he holds the security, whether in the form of mortgage or of land, he gains the added protection of the added value; but when his debt is paid, and his title annulled, he has no claim to anything more. It is said in the *Slee* case to be the invariable rule that where the mortgagee has gotten a renewal of a lease, or obtained any other advantage, in consequence of his situation as such mortgagee, the mortgagor coming to redeem is entitled

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to the benefit thereof. We have carried that doctrine far enough to hold that one who received as collateral security a salt block, and leased it with others of his own to a corporation, taking stock in exchange, might be deemed to have elected to treat the property as entitled to the stock and that the latter was an incidental benefit accruing, the right to which on redemption was the mortgagor's. (*Chapman v. Porter*, 69 N. Y. 276.) If the assignment to Gilbert be treated as a pledge (*Campbell v. Parker*, 9 Bosw. 322; *Dalton v. Smith*, *supra*) the rule is equally familiar that the pledgee must account for incidental income or profits derived from the pledge, and that equity will not tolerate a separation of the pledge from the debt. Here the foreclosure and sale was an incident belonging to possession of the collateral, and to the trust which that possession created. It became the duty of the administrator to sell, because the trust security demanded that action for its safety and strength. It became the duty of the administrator to buy, for the protection of the estate and of the assignor, ultimately liable, and whatever of benefit resulted was an incident of the trust and belonged to the two parties concerned, according to their respective rights, and when the assignor redeemed belonged wholly to him.

The argument founded upon the doctrine of merger is well answered by the opinion of the General Term, which shows that in equity such merger will never be allowed against the interest of the parties or their obvious intention, or where the two estates are held in different rights. We have recently affirmed that view of the doctrine. (*Smith v. Roberts*, 91 N. Y. 470, 475.)

The contention that some unpaid interest should be accounted for by defendant cannot survive the settlement of the administrator's accounts by the surrogate. The notes were then paid with interest. If a greater rate was chargeable that was the time and occasion to have asserted the claim.

The judgment of the General Term should be affirmed with costs.

All concur.

Judgment affirmed.

Statement of case.

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131	482

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
WILLIAM B. JOHNSON, Appellant.

Where an indictment under the Penal Code (§ 284) for seduction under promise of marriage, is defective in not giving the correct surname of the female, the court, on trial, has power to cure the defect by directing an amendment.

The provisions of the Code of Criminal Procedure, allowing such an amendment (§§ 6, 7, 275, 281, 293, 294, 295), are not violative of the provision of the State Constitution (art. 1, § 6), declaring that "no person shall be held to answer for a capital or otherwise infamous crime * * * unless upon presentment or indictment of a grand jury."

An abstract opinion of the court in its charge on the trial of a criminal action, not based on any evidence in the case, even if technically erroneous, is no ground for reversal on appeal. (Code of Criminal Procedure, § 542.)

(Argued December 16, 1886 ; decided January 18, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department entered upon an order made November 9, 1886, which affirmed a judgment of the Court of Sessions of Jefferson county entered upon a verdict convicting the defendant of the crime of seduction under promise of marriage.

The material facts are stated in the opinion.

Thomas F. Kearns for appellant. Section 293 of the Code of Criminal Procedure has lodged with the court a new power in respect to indictments and authorizes their amendment in form merely, where technical informalities or clerical slips are apparent, but not to alter in the body of an indictment the finding of a grand jury upon oath as to any allegation of substance set forth in it. (1 Whar. Crim. Ev. [7th ed.], § 595; 1 Bish. Crim. Pro. [3d ed.], § 688.) The amendment the court authorized, is one in substance and not one in form. (*State v. Startup*, 39 N. J. L. 423; *McLaughlin v. State*, 45 Ind. 338, 346, 347; 1 Bish. Crim. Pl. [3d ed.], § 97; Whar. Crim. P. & P. [8th ed.], § 90; *People v. Poucher*, 30 Hun, 576, 578.) The identification by name, or by descriptive

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words of the person against whom the crime was alleged to have been committed, is a material and substantial allegation in an indictment. (1 Bish. Crim. P. [3d ed.], §§ 488, 677; Whar. Crim. P. & P. [8th ed.], § 116; Whar. Crim. Ev. [8th ed.], § 94; Heard's Crim. Pl. 55, 58.)

E. C. Emerson, district-attorney, for respondent. There was no material variance between the allegations in the indictment and the proofs, but if there was it was cured by amendment. (1 Bish. Cr. Pro. [3d ed.], §§ 688, 689; 1 Chitty Cr. Law, 203, 216; 3 N. Y. R. S. [6th ed.], 1022, § 54; *People v. Powers*, 6 N. Y. 50; *Fleming v. People*, 27 id. 329, 332, 333; Code Crim Pro. §§ 281, 284, 285, 293, 684; *People v. Conroy*, 97 N. Y. 62; *People v. Menkin*, 36 Hun, 90, 95; 1 Chitty Cr. Law, 297; 1 Stark. Crim. Pl. [2d ed.] 259; 2 Tidds Pr. 632, 640.) The amendment authorized is one in form, not in substance. (1 Bishop Cr. Pro. [3d ed.], §§ 97, 98; *Com. v. Holley*, 3 Gray, 458; *People v. Poucher*, 30 Hun, 576, 578.) The charge that the case was brought within the statute, even though the promise was conditional, to marry in case pregnancy resulted, was correct. (Penal Code, § 283; *Kenyon v. People*, 26 N. Y. 203; *Boyce v. People*, 55 id. 644; *Armstrong v. People*, 70 id. 52, 53; *Crozier v. People*, 1 Park. 453.) The court was not bound to amplify or repeat his charge. (*O'Connell v. People*, 87 N. Y. 377; *Moett v. People*, 85 id. 374; *Walker v. People*, 88 id. 82; *Morehouse v. Yeager*, 71 id. 594; *Rexter v. Starin*, 73 id. 601; *Doyle v. Sharp*, 74 id. 154, 160.)

DANFORTH, J. The defendant (appellant here) was by indictment accused of having seduced, under promise of marriage, and having sexual intercourse with one Mary Oliphant at the town of Wilna, she being an unmarried female of previous chaste character. Upon a plea of not guilty the issue was brought to trial at a court of sessions in the county of Jefferson, when the complainant being called as the first witness testified that her name was in fact Mary Olivert. The court thereupon, on the application of the district-attorney, and

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against the objection and exception of the defendant, made an order, which, after reciting that "it appearing upon said trial that the name of the party so alleged to have been seduced is Mary Olivert and not Mary Oliphant," directed the indictment and all the proceedings therein to be so amended as to conform in that respect to the proof, by inserting the name of Mary Olivert in place of Mary Oliphant, and after evidence tending to support the charge had been given the defendant's counsel requested the court to advise the jury to discharge the defendant upon the ground, among others, that there was a variance between the allegations of the indictment and the proof "as to the name of the person alleged to have been seduced." This was refused, and the court gave the case to the jury as one proper for their consideration. And in view of the defendant's claim that the evidence permitted an inference that if any promise of marriage was made, it was not absolute, but conditional, "if the complainant would let him have sexual intercourse with her, that if there was any trouble with her he would marry her;" the judge charged "that even though the defendant may have accomplished the seduction of this female under a promise to marry her on condition she became pregnant with child, that that comes within the purview of the statute and establishes the crime as well as if the promise and agreement to marry had been absolute and without condition." To so much of the instructions as related to the force of a conditional promise, the defendant excepted. These two exceptions present the only questions upon which any doubt can be entertained upon this appeal.

First. The indictment alleges an offense against the statute (Penal Code, § 284), with certainty and precision. No ingredient is omitted, and the only objection is that the surname of the party injured is not stated with entire accuracy. At common law the person charged could require that the name of his accuser, as well as the nature of his crime, should be set forth with certainty, and a variance would have been fatal, unless overcome by the rule of *idem sonans*, as it was called, which in such cases was frequently resorted to in

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courts whose judges were astute to prevent the failure of justice, and whose jurors on such occasions had quick ears for harmony of sounds. In this instance it might be difficult to say that the sound of the woman's name is not affected by the misspelling, but even in England the statute now governs and the court may cure the defect by directing an amendment. (14 & 15 Vict. C. 100, § 1.)

In this State the legislature has in like manner interposed, and an indictment is sufficient if it contains the title of the action, specifying the name of the court to which it is presented, the names of the parties, and a plain and concise statement of the act constituting the crime. (Code of Crim. Pro., § 275.) The parties are defined to be the People of the State, as plaintiff, and the party prosecuted, as defendant (id. §§ 6, 7), and the Code provides that when the offense involves the commission of a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured is not material (id. § 281), and covering, as must be conceded, the case before us, declares that when upon the trial of an indictment, a variance between its allegation and the proof in respect to the name of any person, shall appear, the court may, in its judgment, if the defendant cannot be thereby prejudiced in his defense on the merits, direct the indictment to be amended according to the proof, and after such amendment, the trial is to proceed in the same manner, and the verdict and judgment have the same effect as if the indictment had originally been framed in its amended form. (Id. §§ 293, 294, 295.)

It is contended, however, by the appellant, that this statute, so far as it allows such amendment, is in violation of the constitutional provision that "no person shall be held to answer for a capital or otherwise infamous crime * * * unless upon presentment or indictment of a grand jury." We do not perceive that any security thus afforded is taken away or impaired by the statute, or that it can have any other effect than to promote the ends of justice, by rendering of no avail a purely technical objection, without depriving a

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defendant of any substantial right. The court not only declared the variance immaterial, but the amendment was allowed at the very outset of the trial, and under circumstances which insured to the accused party a full and fair hearing upon the only issue which his plea made material — seduction and sexual intercourse under promise of marriage, with an unmarried female of previous chaste character. (Penal Code, § 284.)

The woman's name was not essential in the description of the offense. It would have been enough, even under the former system of criminal procedure, to have described her as one whose name was to the jurors unknown, and the legislature did not exceed its power when it provided that if the proof showed the name to have been erroneously stated, the variance should not be to the advantage of the offender, unless he was in some way thereby "prejudiced in his defense on the merits." Such effect was not suggested to the trial judge, and the exception was argued upon the sole ground that the court had no legal power to permit the amendment.

Second. As to the other exception. There is no evidence in the case which justified the claim of the defendant that the promise was conditional. That referred to by the appellant, consists of an affidavit made by the complainant on the 11th of August, 1884, before a magistrate, and was introduced by the defendant. It could only bear upon the credibility of the witness, as showing conflicting statements, and was no doubt used for that purpose. It was admissible for no other. The complainant's evidence proved an express and unconditional promise; the defendant denied that a promise of any kind was made. No other issue was presented, and that was in the fairest manner submitted to the jury. The charge of the judge, therefore, to which exception was taken, was a mere "impertinence, or an abstract opinion out of the case," induced by the defendant's assertion, but founded on no evidence, and which could not in any reasonable view work prejudice to the prisoner. It is, therefore, even if technically erroneous, no ground for a new trial. (*Gardner v. Pickett*,

Statement of case.

19 Wend. 186; Code of Crim. Pro., § 542.) But as the question is not properly in the case, we express no opinion in regard to its merits. The evidence as to every element of the crime charged, was abundant both in chief and in corroboration, and while many exceptions were noted during the trial, we find none which affects any substantial right of the defendant.

The judgment should be affirmed.

All concur.

Judgment affirmed.

104	218
181	686

104	218
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127	582
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136	409
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150	845

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156	374
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104	218
173	*187
e173	*189

DANIEL R. LYDDY, Appellant, v. LONG ISLAND CITY,
Respondent.

Although repeals by implication are not favored, yet, where two statutes are manifestly repugnant and tend to nullify each other, the older enactment must yield to and will be considered as repealed by the later.

The provision of the original charter of Long Island City (chap. 719, Laws of 1870), giving to the common council power to employ and pay an attorney, is repugnant to and was repealed by the amended charter (chap. 461, Laws of 1871), and under the latter the common council is placed under an absolute disability to create any debt or liability on the part of the city for legal services.

A person can contract with a municipal corporation only through its authorized agents, and is chargeable with notice of the limitations upon their official authority imposed by general laws.

Where the common council of a city has no authority to create a liability against it by express contract, it cannot legalize such a claim by acknowledgment, ratification or otherwise.

(Argued December 17, 1886; decided January 18, 1887.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made January 17, 1886, which reversed a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury.

The nature of the action and the material facts are stated in the opinion.

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James M. Lyddy for appellant. The common council of Long Island City had full legal power and authority under its charter to employ counsel. (Laws of 1870, chap. 719; Laws of 1871, chap. 461.) Unless a subsequent statute is inconsistent with or repugnant to a former statute, both must be construed as standing together. (*People v. Palmer*, 52 N. Y. 85; *Smith v. People*, 47 id. 330; Pott. Dwar. on Stat. 156, 157; *People ex. rel. Twenty-third St. R. R. Co. v. Com'rs. of Taxes*, 95 id. 558; *People ex. rel. Wood v. Lacombe*, 99 id. 43; *Mark v. Stone*, 97 id. 572; *Legrand v. Man. Mer. Ass'n*, 80 id. 638 v. *Le Couteux v. City of Buffalo*, 33 id., 336; *Ketcham v. City of Buffalo*, 4 Kern. 356.) Where a party has sufficient remedy at law against a public officer, the court is not bound to grant the writ of *mandamus*, but may, in its discretion, refuse the writ and remit the party to an action at law. (*People v. Thompson*, 99 N. Y. 641; *People ex. rel. Lunney v. Campbell*, 72 id. 496.) The defendant was estopped from denying plaintiff's claim. (*Curnen v. Mayor, etc.*, 79 N. Y. 514; *People ex. rel. Ryan v. French*, 14 Weekly Dig. 173; *O'Leary v. Board of Education, N. Y.*, 93 N. Y. 4, 5; *People ex. rel. Wright v. Com. Coun. of Buffalo*, 16 Abb. [N. C.] 96; Sedg. on Stat. Law, 92; 1 Kent [7th ed.] 513; m. p. 464; *Stief v. Hart*, 1 N. Y. 20-30.)

Jesse Johnson for respondent. The defendant corporation never employed or retained the plaintiff. (*Keys v. Westford*, 17 Pick. 273.) The burden was on the plaintiff to prove that there was a fund in the treasury at the time he was retained with which to pay him. (*Starin v. Town of Genoa*, 23 N. Y. 449; *Donovan v. Mayor, etc.*, 33 id. 293; *McDonald v. Mayor, etc.*, 68 id. 23; *Callahan v. Mayor, etc.*, 6 Daly, 230, 260; *Lawrence v. Mayor, etc.*, 54 How. 225, 260.) The employment was in violation of the provision of defendant's charter. (*Smith v. Mayor, etc.*, 5 Hun, 237, 239; *In re Mead*, 74 N. Y. 216, 219; 1 Dillon on Mun. Cor., chap. 460.) The plaintiff's proper remedy was by *mandamus*. (*Dannat v. Mayor, etc.*, 66 N. Y. 585; *Swift v. Mayor, etc.*, 83 id. 528.)

Opinion of the Court, *per Curiam*.

Per Curiam. The plaintiff had judgment upon a trial, before the court without a jury. On appeal the General Term reversed the judgment for alleged errors of law, and ordered a new trial.

The plaintiff appeals from such reversal upon the usual stipulation for judgment absolute in the event of an affirmance by this court of the order appealed from.

The action was brought to recover for legal services alleged to have been performed by the plaintiff, at the request and upon the employment of the common council of Long Island City, in the investigation of certain alleged abuses by the board of water commissioners in the administration of the affairs of the water department of the city.

It is claimed by the respondent that the common council had no authority, under its charter, to create any liability against the city for such services, a previously existing statute giving such authority having been repealed before the rendition of the services.

The defendant was originally organized as a city under chapter 719 of the Laws of 1870, and among the powers given to its common council by that act, was that of employing "an attorney and counsel when the business of the board required one, and to pay them a reasonable compensation."

This charter was revised and extended by chapter 461 of the Laws of 1871, and it is claimed by the respondent that thereby, the authority of the common council to employ attorneys was taken away, and that thereafter it was placed under an absolute disability to create any debt or liability on the part of the city for legal services.

While no express repeal of the provisions of the law of 1870, is contained in the act of 1871, it is provided that such provisions thereof as are "not inconsistent with the provisions of this act are to be construed with and made applicable hereto." A clear implication arises from this language that such parts of the former statute, as are repugnant to or inconsistent with the provisions of the later act are intended to be repealed.

It is properly urged by the appellant's counsel, that repeals

Opinion of the Court, *per Curiam*.

by implication are not favored by the law, and that a prior statute shall not be deemed repealed by a later one, when they can both be given a legitimate effect, and stand together. The rule, however, implies that if the two acts are manifestly repugnant and tend to nullify each other, then the older enactment must yield to the later statute. (*Mark v. The State*, 97 N. Y. 572.)

Upon examining and comparing these statutes, with the view of discovering the legislative intent upon the subject, it is apparent that the act of 1871 is much more elaborate, and attempts to establish a more comprehensive, systematic and detailed form of municipal government than that provided by the act of 1870. Among other things, this charter undertook to classify the business of the city, and for that purpose provided for the establishment of eight separate departments, consisting of the following: "Finance department and receiving taxes, law department, department of public-works, police and health department, a board of education, board of water commissioners, a fire department, a board of assessors."

Of the law department it was enacted that it should "have charge and conduct of *all law business* of the corporation and of all the co-ordinate departments created by this act. The chief officer of the department shall be called the attorney and counsel to the corporation. For such services he shall receive an annual salary of two thousand dollars, in lieu of all charges against the city for the same. He shall be appointed by the mayor, and shall hold his office for the term of three years, or until his successor shall have been appointed."

The common council are required to raise annually a sum, not exceeding \$75,000, for the wants and welfare of the city, which sum is to be the budget for the ensuing year, and is required to be divided among the various departments of the city in certain specified proportions, the sum of \$8,000 being assigned to the maintenance of the law department and expenses of local judiciary. The common council is forbidden to divert any money from one fund or budget to another.

It is also forbidden to borrow money or to issue bonds or

Opinion of the Court, *per Curiam*.

other evidences of debt, or to incur liability for the payment of any money, or direct any work for the payment of which the city may become liable beyond the amount of cash applicable to the particular purpose then in the treasury of the city, and all acts done, bonds, or other evidences of debt, issued and debts contracted, contrary to the true meaning and intent of this section, shall be absolutely null and void as against said city, but the members of the common council voting therefor, shall be jointly and severally liable therefor.

The slightest consideration of these provisions shows an insurmountable repugnancy existing between them and the provisions of the act of 1870.

By the later act the selection and appointment of attorneys to transact the legal business of the corporation, is confided wholly to the mayor, their compensation is fixed and limited by law, and is payable from a fund specially and inviolably devoted to that purpose, and it purports to organize a complete and perfected bureau for the transaction of all the corporate legal business of the municipality.

It was not contemplated that extra counsel should be employed to perform legal services for the corporation, and no power was lodged in the authorities to provide funds for their compensation even if employed.

The scheme of the act was to guard the city from loose, reckless and indefinite expenditure, and limit the power of its authorities to create debts, by the most careful and stringent provisions.

All of the law business of the corporation was required to be performed by the officers of the law department, and their compensation was limited, and the common council was prohibited from using any of the funds raised for that department for any other purpose.

The carefully devised plan to limit the power of the common council in the incurrence of liability on the part of the city, would be frustrated, and the scheme of the act in respect to the financial economy of the city, would be nullified and defeated, by the retention of the provisions of 1870.

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It is not in accordance with settled rules of construction to ascribe to the law-making power an intention to establish conflicting and hostile systems upon the same subject, or to leave in force provisions of law, by which the later will of the legislature may be thwarted and overthrown. Such a result would render legislation a useless and idle ceremony and subject the law to the reproach of uncertainty and unintelligibility.

We are, therefore, of the opinion that the provisions of the act of 1870, referred to, were inconsistent with, and necessarily repealed by the subsequent statute, and that the common council had no power to bind the defendant, by the employment of the plaintiff to render legal services. The plaintiff could contract with the city only through its authorized agents, and he is chargeable with notice of the limitations upon their official authority imposed by general laws. (*Donovan v. City of New York*, 33 N. Y. 291, 293.)

It follows, as the necessary result of the want of power on the part of the common council, to create liability by express contract, that it could not legalize such claim by acknowledgment, ratification or otherwise.

The question here discussed is fairly presented by the exceptions taken to the finding of law that the defendant is indebted to the plaintiff, and the refusal to find that the liability of the defendant is controlled by the statute of 1871.

The judgment should be affirmed and judgment absolute ordered in favor of defendant. with costs.

All concur.

Judgment affirmed.

HARMANUS B. HUBBARD, as Executor, etc., Appellant, v. H.
M. SADLER et al., Respondents.

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78	AD*185

The act of 1875 (chap. 482, Laws of 1875), giving to the board of supervisors of any county, containing an incorporated city of over 100,000 inhabitants, where contiguous territory has been mapped out into streets and avenues, power to lay out, open and grade the same, as amended

Statement of case.

in 1881 (chap. 554, Laws of 1881), authorizes the board of supervisors to provide for the issuing of short-term town bonds, upon which to borrow money to pay awards to land owners, the town to be reimbursed by the local assessment, and in case of a deficiency, by general taxation. The fact that the act authorized the issuing of long term bonds for certain, special and extraordinary expenditures does not exclude an intent to bestow authority to borrow money on the town bonds for other purposes.

When the Legislature has conferred authority upon a board of supervisors, as to all incidents and details, and the mode of accomplishing a purpose, if the board acts within the scope of the legislative enactment, its action may not be reviewed.

(Argued December 17, 1886; decided January 18, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made September 23, 1885, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial without a jury.

This action was brought originally by Peter Wyckoff, the present plaintiff's testator, to restrain defendants from entering upon certain lands of the plaintiff in the town of New Utrecht, Kings county, and from grading and constructing any roadway or sidewalks thereon.

A proceeding had been instituted under the act chapter 482, Laws of 1875, as amended by chapter 365, Laws of 1880, and chapter 554, Laws of 1881, for the opening of Eighteenth avenue, which was included in the system of streets and avenues as laid out and mapped by the "town survey commissioners of Kings county" under chapter 670, Laws of 1867. An order had been granted therein confirming the report of the commissions of awards and assessments.

The resolution of the board of supervisors of Kings county relating to awards and compensation for lands taken for the the avenue provided for an award of damages, an assessment upon lands benefited, the application of moneys received on the assessment to the payment of awards and expenses, and authorized the supervisor of the town to borrow and to issue the town bonds for such sums as may be necessary to pay the

Statement of case.

amount of unpaid assessments, and directed that all sums received by the supervisor in payment of assessments or for lands sold to collect the same, after deducting necessary expenses, should be applied to the payment of the bonds, and it was provided that any deficiency of principal and interest on said bonds should be made a tax on the real and personal estate of the town to be collected with the annual taxes.

John D. Pray for appellant. Where public officers are proceeding illegally and improperly, under a claim of right, to construct a road over private property, the court will interfere by injunction to restrain them. (*Mohawk & H. R. R. Co. v. Archer*, 6 Paige, 83; *Johnson v. City of Rochester*, 13 Hun, 285.) No public right or easement was ever lawfully acquired in the plaintiff's land. (Constitution, art. 1, § 6; *Gardner v. Vil. of Newburgh*, 2 John. Ch. 162; *People ex rel. Utley v. Hayden*, 6 Hill, 359; *Wallace v. Karlenoufsky*, 19 Barb. 118; *Chapman v. Gates*, 54 N. Y. 132; *Sage v. Brooklyn*, 89 id. 189; *In re Mayor, etc.*, 99 id. 577.) The board of supervisors had no power to direct the supervisor to borrow money on the faith and credit of the town and to issue the bonds of the town for the purpose of paying the awards, nor to provide for the payment of such bonds by taxation on the real and personal estate of the town. (Cooley on Taxation, 209; Dillon on Mun. Cor. §§ 469, 470, 610, 617.) No power in boards of supervisors to direct the borrowing of money, and the issue of the bonds in question is to be implied from the powers expressly granted by the acts of 1875 (chap. 482), 1880 (chap. 365) and 1881 (chap. 554). (Cooley on Taxation, 209, 257; *Sharp v. Speir*, 4 Hill, 76; Dillon on Mun. Cor. [3d ed.] § 507; *Starin v. Town of Genoa*, 23 N. Y. 439, 449; *Van Alstyne v. Freclay*, 41 id. 174; *Mather v. Crawford*, 36 Barb. 564.)

Wm. Sullivan for respondents. If the decision of the case at bar does not necessarily involve the determination of

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the constitutional question raised by the appellant, it is the duty of the court to refrain from passing upon it. (Cooley's Const. Lim. [5th ed.] 196.) The plaintiff was a party to the proceeding in the Supreme Court, and, therefore, the adjudications therein are binding upon him, from which it follows that he has been compensated by the deduction of his award from his assessment for benefits. The constitutional question which plaintiff seeks to litigate in this action could have been litigated and passed upon in the application for the appointment of the opening commissioners, and hence he is not in a position to raise it in this action. (*In re Church*, 92 N. Y. 1; *Dolan v. Mayor, etc.*, 62 N. Y. 472; *In re Department of Parks*, 73 id. 560, 565; *Pittman v. Mayor*, 3 Hun, 370; *aff'd*, 62 N. Y., 637; *M. E. Church at Harlem, etc., v. Mayor, etc.*, 55 How. 57; *De Peyster v. Mali*, 92 N. Y. 262; *Pray v. Hegeman*, 98 id. 351; *Betts v. City of Williamsburgh*, 15 Barb. 255; *Roxford v. Knight*, id. 627; *Genet v. City of Brooklyn*, 92 N. Y. 296, 305.) The appellant was guilty of *laches*, and would have been precluded thereby from maintaining this action, even if his award had exceeded his assessment for benefits. (*In re Woolsey*, 95 N. Y. 142; *Chase v. Chase*, id. 373, 379, 380; *In re Spuyten Duyvil Parkway*, 67 How. 341; *Pryzbylowicz v. Missouri R. R. Co.*, 3 McCrary, 586.) The county board may also authorize and direct the town to issue bonds in anticipation of the collection of the opening assessment. (*In re Church*, 92 N. Y. 1.) The twenty-ninth subdivision of section 1, chapter 482, Laws 1875, cannot be regarded as an implied prohibition against the issuing of bonds in cases other than those therein specified, but is rather to be construed as a provision measuring and limiting the extent of the power of the county board as to the issuing of bonds in the cases therein specified, or as a provision inserted *ex abundanti cautela*. (Dillon Mun. Cor. [3d ed.] §§ 117-127; *Kelly v. City of Buffalo*, 21 Barb. 294; 14 N. Y. 356, 375, 376; *People v. Brennan*, 39 Barb. 522.)

Opinion of the Court, per FINCH, J.

FINCH, J. The constitutional question raised in this case was decided against the views of appellant in the *Matter of Church* (92 N. Y. 1). It is now suggested that a difficulty exists, not then considered, in the alleged fact that the act of 1875 (chap. 482), with its amendments, does not authorize the supervisors to issue bonds in order to obtain money with which to pay awards to land owners and, inferentially at least, forbids such issue. We did not, in the case cited, discuss that question but practically decided it when we held that the public purse stood behind the awards and guaranteed their payment. The statute, as amended (Laws of 1881), gives authority to the supervisors, as a local legislature, to lay out and construct certain streets and avenues and to provide, by limited or general assessments, for the payment of damages awarded for property taken. Under this authority the supervisors acted. They provided first for an assessment district of property benefited, upon which, as an area of taxation, the cost of the improvement was imposed, but, recognizing its possible insufficiency, further provided that any deficiency of principal or interest upon the debt incurred by the awards should be paid by general taxation. It is the mode of reaching, rather than the substance of this result, which is the subject of criticism. The resolution authorizes the issue of short term bonds, none running longer than six years and some only two, upon which to borrow money for the payment of the awards. The proceeds of the loan were to be at once devoted to such payment and the town to be reimbursed by the local assessments, and in case of their deficiency by general taxation. To effect this result the resolution provides "that any deficiency required to meet the principal and interest on said bonds shall be made a tax on the real and personal estate of the town." It is now argued that a deficiency upon the bonds is all that is provided for, and payment is due to the land owner from their proceeds alone, and if there can be no bonds there can be no payment. But the local legislature authorized explicitly their issue, and if, in doing so, it acted within the scope of the statute, committing to it upon some subjects and within some

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limits the powers and duties of a legislature, that is an end of the question. Of course it is not doubted that the State may confer upon a municipal corporation the power to borrow money, if otherwise it did not exist. What it could itself do in laying out, opening and grading streets and avenues, like the one in question, it could authorize the local legislature to do with all its own discretion. It did confer such authority in broad and general terms by the act of 1875 and its amendments. It transferred to the supervisors its own power and authority as to a particular class of streets and avenues to fix a plan for their grades, to lay out, open, grade, construct, close and alter any of them, to "provide" for the estimate and award of damages, for an assessment on property benefited, for the levying, collection and payment of damages, and all other charges and expenses necessary to be incurred. Control over the whole subject, legislative discretion as to all incidents and details and the mode of accomplishing the purpose, was thus in the broadest and most general way conferred upon the supervisors. Providing for assessments for benefit and general taxation of the town for any possible deficiency, they could, as they did, and as was right and reasonable in the interest of the land owner, anticipate the slow collection of such proceeds by borrowing the money needed for payment beyond the collections of the first thirty days, to pay the awards, giving in exchange the obligations of the town running only for the comparatively brief period of reimbursement. Reference is, however, made to subdivision twenty-nine of the act of 1875, which gives authority for the issue of long term bonds not exceeding twenty years for the purpose of building or repairing bridges, purchasing turnpike roads or toll bridges, buying land for a town hall and constructing the same, and enlarging cemeteries, and it is argued that this grant of authority excludes an intention to bestow it in other cases. These are special, and to some extent unusual and extraordinary expenditures, as to which there might possibly have arisen doubt whether the creation of a long term bonded debt was a necessary incident of a general

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grant of power. It may not have been needed, but if it was, it seems to have been rather for the purpose of limiting and defining the power of borrowing money which might have flowed from the general grant of authority than of supplying its absence, and cannot by inference forbid the borrowing of money for short periods in anticipation of a tax ordered to be laid for reimbursement. (*Ketchum v. City of Buffalo*, 14 N. Y. 356, 376.) Practically the town is authorized to incur the debt to the land owners. It is made responsible for its payment and authorized to provide the necessary means, and through the provision for a general tax, upon failure of the special assessments, becomes as to the land owner the real debtor. We think the grant of legislative power was not exceeded by the act of the supervisors in providing, through a temporary loan, for the prompt and immediate payment of the awards pending the ultimate reimbursement by taxation.

No other question is raised in the case and the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

JOHN C. ROBERT et al., Appellants, v. H. M. SADLER et al.,
Respondents.

Where the public have taken an easement for a street or highway, and the surface of the land is above the grade of the highway, so that, in order to reach the grade line, it is necessary to remove the superincumbent material, this may be used on other portions of the road, on the premises of other land owners; but the public easement justifies only the taking of earth and soil which the process of construction or repair requires, and necessarily compels to be removed.

Where, therefore, the defendants, in the performance of a contract with the public authorities for the construction of a highway across plaintiffs' land, the surface of which was above the grade of the highway, not only removed the gravel and other materials above grade, but, also, dug and were digging pits in the highway to the depth of six feet below grade to get gravel with which to cover the roadway on lands not owned by plaintiffs. *Held*, that plaintiffs could maintain an action to restrain the further removal of the gravel.

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The smallness of the value of the fee in a highway does not justify a seizure of the fee without due and lawful authority or its destruction by indirect rulings.

N. F. S. B. Co. v. Bachman (4 Lans. 523); *Denniston v. Clark* (125 Mass 216); *City of N. H. v. Sargent* (38 Conn. 50); distinguished.

Bissell v. Collins (28 Mich. 277); questioned.

Robert v. Sadler (37 Hun, 377) reversed.

(Argued December 18, 1886; decided January 18, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made September 23, 1885, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial without a jury. (Reported below, 37 Hun, 377.)

This action was brought to restrain the defendants, who were engaged in the work of grading Eighteenth avenue, in the town of New Utrecht, among other things, from digging pits in the roadway and carrying away gravel therefrom.

The material facts are stated in the opinion.

J. D. Pray and *H. B. Hubbard* for appellants. No public right or easement was ever lawfully acquired in the plaintiffs' land. Private property cannot be taken for the public use unless provision be made by law for compensation to the owner. (Const. art. 1, § 6.) A remedy for compensation, contingent upon the realization of a fund by taxation for benefit within a limited district, does not meet the constitutional requirement. (*Gardner v. Village of Newburgh*, 2 John. Ch. 162; *People ex rel. Utley v. Hayden*, 6 Hill, 359; *Wallace v. Karlenoufsky*, 19 Barb. 118; *Chapman v. Gates*, 54 N. Y. 132; *Sage v. Brooklyn*, 89 id. 189; *In re Application of Mayor, etc., of N. Y.*, 99 id. 577. The public, if the proceedings were regular and lawful, acquired only an easement for the purposes of this avenue, and the original proprietor of the land is the owner of the soil for all purposes not inconsistent with the public rights, and may maintain actions accordingly. (2 Dillon on Munic. Corp. [3d ed.] §§ 663, 687; *Jackson v. Hathaway*, 15 Johns. 447; *Trustee of*

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Presb. Soc. v. A. & R. R. R. Co., 3 Hill, 567; *Milhan v. Sharp*, 15 Barb. 193-210; *Fisher v. City of Rochester*, 6 Lans. 225; *Niagara Falls S. B. Co. v. Bachman*, 4 Lans. 523.)

William Sullivan for respondents. A reasonable public use of land taken for a public way includes more than the mere right of travel. It includes also, all the powers and privileges incident to the right of way, such as the right to utilize, for the purpose of making or repairing the street, whatever materials may be found within its limits, whether above or beneath the surface. (*Griffin v. Martin*, 7 Barb. 297; *Hardenburg v. Lockwood*, 29 id. 9; *City of New Haven v. Sargent*, 9 Am. Rep. 360; 38 Conn. 50; *Bissell v. Collins*, 15 Am. Rep. 217; 28 Mich. 277.) Where the enjoyment of a public easement in land is permanent and perpetual, as in the case of land taken for a public street, the compensation awarded to the owner is estimated at the full value of the land itself, and, consequently, the public are entitled to the beneficial use and enjoyment of the land, for the purpose for which it was acquired, and the owner of the mere naked fee, as against the public, has no possessory right to the land. There cannot be any conjoint occupation of the owner and the public, as between him and the public, the value of his estate in the land is merely nominal. (*Murray v. County Com'rs*, 12 Met. 457; *Cooley's Const. Lim.* [5th. ed.] 683; *In re Com'rs of Central Park*, 54 How. 313; *De Peyster v. Mali*, 27 Hun, 441, 442.)

FINCH, J. The constitutional question in this case has been decided against the appellant in *Hubbard* against the same defendants, which respected the laying out and opening of the same street or avenue involved in this appeal.

But a further question not in that case is raised in this. The findings of fact establish that the grade of the avenue was fixed and a contract for its construction made with one Curran. By the terms of that contract he was required to cover the roadway to a depth of fifteen inches with gravel,

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hard-pan or other materials approved by the commissioners. The land within the road lines crossing plaintiffs' premises was higher than the grade fixed and required a removal of the earth to the depth of such grade and possibly fifteen inches below it. The contractor not only removed this material above grade and used it upon the avenue for the purpose of filling and construction, but he dug pits in the roadway to a depth of six feet below the grade in order to get gravel with which to perform his contract without paying for it, and it is found that these pits thus made are "intended and required" to be filled up again with earth before the avenue is completed. The complaint alleges that the pits were dug on "the sidewalk" of said avenue, and the answer admits that "the gravel pits of which the plaintiffs complain have been dug for the purpose of obtaining gravel to be used on the roadway." It is conceded that the public took only an easement for a street or avenue over the plaintiffs' premises, and that they retained the fee in that part of the land on which the pits were dug. The justification which has succeeded goes upon the ground that the acts complained of were embraced in the easement and authorized by it. The question involved was properly raised by exceptions. The courts have held that where, to reach and prepare the surface of the road in accordance with its grade line, superincumbent material is necessarily removed, it may be used upon other parts of the road and on the premises of other land owners, and that where there has been no negligence in construction consequential injuries necessarily resulting cannot be recovered. It was said in *Pumpelly v. Green Bay Company* (13 Wall. [U. S. Sup. Ct.] 166, 181), that this class of decisions "have gone to the uttermost limit of sound judicial construction" and "in some cases beyond it." The observation was just. To take merely an easement in land leaving the fee in the owner, and then, by advancing stages of judicial endurance, sap the value and utility of the fee by adding its benefits to the easement is scarcely consistent with a policy which is at the same time sedulously protecting the rights of abutters, having no fee in the street whatever,

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to their easements of light and air and access. It is perfectly well settled that in a case like the present the public acquire only a right of way with the powers and privileges *incident* to that right (*Jackson v. Hathaway*, 15 John, 447, 452), and that the owner of the fee retains his exclusive right in all mines, quarries, springs of water, timber and earth for all purposes not incompatible with the right of way. The question in every case turns upon what is "incident" to the construction or maintenance of the right of way. In *Higgins v. Reynolds* (31 N. Y. 156), stone was taken from the limits of a highway and its value recovered. In *Niagara Falls Suspension Bridge Company v. Bachman* (4 Lans. 523), it was said that gravel might be removed to other parts of the road, but it is quite apparent that this was gravel necessary to be removed in order to get the highway to its grade. In *Fisher v. City of Rochester* (6 Lans. 225), the work done was the construction of a sewer and the contractor used stones excavated from within the street limits. It was held that they belonged to the land owner. In *Kenney v. Williams* (14 Barb. 629), the owner of the fee took away sand from within the limits of the highway but without injury to the public right of travel and his action was sustained. In *Denniston v. Clark* (125 Mass. 216), the gravel removed was a bank above the grade necessary to be cut through and such as afterward from natural causes fell down from the side slopes and filled the ditches which it became necessary again to open. These are the cases cited by the General Term. None of them sustain the conclusion reached. Those which are not adverse justify only the taking of earth or soil which the process of construction or repair requires and necessarily compels to be removed. I have found no case in this State which goes further, and am unwilling to pass beyond those limits. Here the pits were dug to be filled again. Concededly the process was to take from the land owner valuable material and substitute a poorer quality. Digging the pits was not only no incident necessarily or naturally growing out of construction but a deliberate destruction of the grade when reached and which did not

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need to be disturbed, but, on the contrary, compelled replacement and repair of the mischief done. Of the two cases cited from other states one goes no further than we here concede to be just. (*City of New Haven v. Sargent*, 38 Conn. 50.) The court is careful to speak of the soil taken as that "which must necessarily be removed by some one in grading the street." The other, *Bissell v. Collins* (28 Mich. 277), seems to go further because the "major portion of the gravel was taken from below the grade of the street." The report of the case furnishes no details, and it may be that the gravel removed was loosened and made superfluous at the point of removal in the ordinary process of grading. If it goes further we do not think its doctrine should be followed.

The cases which hold that the fee in a highway devoted to the perpetual easement of the public use is of only nominal value, need not be considered. If such value is in any case a question of law which the court may determine, the smallness of the value does not justify a seizure of the fee without due and lawful authority or its destruction by indirect rulings. No invasion of the property rights of the citizen can safely be deemed trifling.

The judgment and order appealed from should be reversed and a new trial granted, costs to abide the event.

All concur except RUGER, Ch. J., and EARL, J., not voting.
Judgment reversed.

LULA C. JONES, Respondent, v. LEWIS JONES et al., Appellants.

The necessity of an order of the Court of Common Pleas of the city of New York, allowing an appeal to this court as required by the Code of Civil Procedure (§ 190), was not dispensed with by the act of 1886 (chap. 418, Laws of 1886), in reference to appeals from judgments of the General Term of the City Court; as the main object of the act, which is to dispense with appeals from such judgments to the Court of Common Pleas, has failed because unconstitutional, and as all the provisions are connected, being parts of a single scheme, the incidental provision must fail also.

(Submitted November 23, 1886; decided January 18, 1887.)

Opinion of the Court, per RAPALLO, J.

THIS was a motion to dismiss an appeal, the nature of which is stated in the opinion.

Wm. W. Badger for motion. As the object sought to be accomplished by the act of 1886, chapter 418, wholly failed, the act is therefore void for all purposes. (*In re Middletown*, 82 N. Y. 202; *Rochester v. Briggs*, 50 id. 566; Cooley on Const. Lim. 178; *Webb v. Mayor, etc.*, 64 How. Pr. 10.)

Wm. Gibson Jones opposed.

RAPALLO, J. In this case the defendants took an appeal from the judgment of the General Term of the City Court of New York to the Court of Common Pleas of the city and county of New York, where the judgment was affirmed after the passage of chapter 418 of the Laws of 1886. From this judgment of affirmance the defendant appealed to this court, without first obtaining leave from the Court of Common Pleas to appeal, as required by section 190 of the Code, and the respondent now moves, on that ground, to dismiss the appeal.

The appellants contend that, although the act of 1886 is held to be unconstitutional in so far as it dispenses with an appeal to the Court of Common Pleas, it should still be held valid and effectual in so far as it has the effect of dispensing with the necessity of an order of the Court of Common Pleas allowing an appeal from its judgment.

After giving the point due consideration, we have concluded that the main object of the act of 1886 having failed, we should not divide it into parts, and sustain the portion which is claimed to obviate the necessity of an order allowing the appeal, but that all the provisions are connected as parts of a single scheme, and that the incidental provisions must fall with the failure of the main purpose of the act.

An order allowing the appeal was, consequently, necessary, and for want of such an order the appeal should be dismissed, but without costs.

All concur.

Appeal dismissed.

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GEORGE C. CARTER, Respondent, v. EMILY P. BECKWITH et al.,
as Administrators, etc., Appellants.

The right of the court, under the Code of Civil Procedure (§ 1836), to allow costs to the plaintiff, in an action against executors or administrators upon a claim against the estate, where they have refused to pay the claim, or any part of it, is not affected by the fact that the amount claimed in the account presented was larger than the amount claimed in the complaint, or that the latter claim was larger than the recovery. Where it appears that, upon presentation of the claim, the defendants not only refused to pay, but also to refer it, to entitle plaintiff to costs, it is not essential to show that, after the refusal, he made an offer of reference before the commencement of the action.

(Argued January 18, 1887; decided January 25, 1887.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department made April 20, 1886, which affirmed an order of Special Term allowing plaintiff costs herein.

The nature of the action, and the material facts, are stated in the opinion.

John Lansing for appellants. The plaintiff can recover no costs in this action unless it appears that the demand was presented, that its payment was unreasonably resisted or neglected, or that the defendants refused to refer the claim as prescribed by law. (Code Civ. Pro., §§ 1835, 1836.) The account presented, including in it a large number of items, which are not claimed, is not a substantial compliance with the demands of the statute, and without such compliance there can be no award of costs. (*Knapp v. Curtiss*, 6 Hill, 386-388; *Wallace v. Markham*, 1 Den. 671-673.) The claim in this case was not unreasonably resisted. (*Roberts v. Dilman*, 7 Wend. 522; *Carhart v. Blaisdell's Ex'r*, 18 id. 531; *Sutton v. Newton*, 22 N. Y. Week. Dig. 140.) The defendants never refused to refer the claim as prescribed by law. (*Buckhout v. Hunt*, 16 How. 407; *Proude v. Whiton*, 15 id. 304; *Stephen v. Clark*, 12 id. 282; *Cruikshanks v. Cruikshanks*, 9 id. 350; *Swift v. Blair's Ex'rs*, 12 Wend.

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279.) The referee's certificate presented to the Special Term was insufficient and not in conformity to the provision of the Code of Civil Procedure. The facts not appearing by the certificate the plaintiff cannot be awarded costs. Without the proper certificate the court has no power to act. (*Sutton v. Newton*, 22 N. Y. Week. Dig. 140; Code Civ. Pro. § 1836; *Carhart v. Blaisdell's Ex'rs*, 18 Wend. 531, 532; *Buckhout v. Hunt*, 16 How. 407, 411; *Gansvort v. Nelson*, 6 Hill, 389, 394; *Smith v. Randall*, 67 Barb. 377.) The award of costs against an executor or administrator is in all cases, after the performance of the conditions precedent, which are all necessary before the plaintiff is in a position to ask for an award of costs, discretionary with the court. The plaintiff is not entitled to the costs as a matter of right. (*Sutton v. Newton*, 22 N. Y. Week. Dig. 140; *Miller v. Miller*, 67 How. 135, 143; *Daggett v. Mead*, 11 Abb. [N. C.] 116; Code Civ. Pro., §§ 1836, 3228, 3229.)

P. C. J. De Angelis for respondent. The claim was duly presented to the administrators within the time limited by their published notice for the presentation of claims, they refused to refer said claim; the action was thereupon brought, and, according to the uniform practice, the plaintiff is entitled to his costs. (2 R. S., chap. 6, title 3, art. 2, p. 90; 3 R. S., [Bank's 5th ed.] 175, 176; *Snyder v. Snyder*, 26 Hun, 324; *Smith v. Randall*, 67 Barb. 377; *Field v. Field*, 77 N. Y. 294.) Assuming that this is an action at law, and that the law previous to the adoption of the Code of Civil Procedure governs, the award of costs was probably improper, but would not effect the legality or validity of the report. (*Bailey v. Berger*, 5 Hun. 555; *Morgan v. Skidmore*, 3 Abb. [N. C.] 92.) If it be an action in equity, then, assuming that the old law is applicable, the award of costs by the referee is correct. (*Van Riper v. Poppenhausen*, 43 N. Y. 68.) If it be an action in equity, and the present law governs, the referee was right in passing on the question. (Code of Civ. Pro., § 1022.)

Opinion of the Court, per EARL, J.

EARL, J. In 1876, the defendants were appointed administrators of Richard Beckwith, deceased. Under an order of the surrogate, they published a notice to creditors to present their claims on or before July 25, 1877. The plaintiff, having a demand against the intestate for services rendered to him, and disbursements made for him as an attorney, on the 21st of July, 1877, personally presented a claim for such services and disbursements to the administrators, amounting in the aggregate to \$2,554.25, in the form of a bill of particulars. On the 31st of July, 1877, the attorney for the defendants wrote a letter to the plaintiff, which was received by him, of which the following is a copy: "DEAR SIR. — Your account against the estate of the late Mr. Beckwith has been shown to me by the administrators of Mr. Beckwith's estate, and they direct me to inform you that they decline to pay the same or any part of it. They also direct me to inform you that they will not consent to a reference, and if you insist upon its payment you must proceed immediately." Subsequently the defendants offered to pay the plaintiff \$110 upon his claim, and thereafter, on the 10th day of July, 1878, the plaintiff commenced this action to recover the sum of \$1,412.63, for services rendered, and money disbursed for the intestate. The action was put at issue and subsequently referred by order of the court and tried before a referee, who made his report awarding the plaintiff \$573.63, besides costs. Upon the reference evidence was given of the presentation of the account to the administrators as above-mentioned, and that the plaintiff received the letter rejecting the claim. The referee made his certificate as follows: "That said action was brought against Emily P. Beckwith as administratrix, and Alexander Kanady and Samuel O. Kanady as administrators of the estate of Richard Beckwith, deceased, to recover a sum of money only, and that it appeared upon such trial that the plaintiff's demand in said action was presented to said defendants before the expiration of the time limited by the notice published as prescribed by law, requiring creditors to present their claims, and that said defendants refused to refer said claim, as pre-

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scribed by law." Upon the affidavit of the plaintiff and the referee's certificate, the plaintiff made a motion for an order allowing him costs against the defendants. That motion was opposed upon the affidavit of defendants' attorney, but was granted; and this appeal is from an order of the General Term affirming that order.

We think the order is right. Section 1836 of the Code provides as follows: "When it appears, in a case specified in the last section, that the plaintiff's demand was presented within the time limited by a notice, published as prescribed by law, requiring creditors to present their claims, and that the payment thereof was unreasonably resisted, or neglected, or that the defendant refused to refer the claim as prescribed by law, the court may award costs against the executor or administrator, to be collected, either out of his individual property, or out of the property of the decedent, as the court directs, having reference to the facts which appeared upon the trial. Where the action is brought in the Supreme Court, or in a Superior City Court, the facts must be certified by the judge or referee before whom the trial took place." We think within the meaning of that section that the claim upon which the plaintiff recovered was presented to the administrators. It matters not that the amount claimed in the account as presented was larger than the amount claimed in the complaint, and much larger than that recovered. It was the same claim, for the same services and disbursements, and the administrators were in no way mislead or prejudiced by the amount. (*Field v. Field*, 77 N. Y. 294.) The letter of the defendants' attorney was a positive refusal to refer the claim or to pay it, or any part of it. After such an unqualified refusal, the plaintiff was not bound to go further and make another distinct offer of reference before commencing his action in order to entitle him to costs.

The order should be affirmed.

All concur.

Order affirmed.

THE PEOPLE ex rel., THE PANAMA RAILROAD COMPANY,
Appellant v. THE COMMISSIONERS OF TAXES OF THE CITY
OF NEW YORK, Respondent.

Under the act of 1857 (Chap. 456, Laws of 1857), in reference to the assessment of taxes on corporations, the capital stock of a corporation, less the part thereof owned by the State or by literary or charitable institutions, or exempted from taxation by the Revised Statutes (1 R. S. 388, § 4), is to be assessed at its actual value, whether more or less than its nominal amount, deducting, however, therefrom the assessed value of its real estate and shares owned by it in other taxable corporations, and, also, from its surplus or reserved fund, if any, an amount not exceeding ten per cent. of its capital.

Where a corporation, liable to taxation under said act, has real estate in another State or country, the provision directing a deduction of the assessed value of such real estate requires that the deduction shall be measured by its actual value, and, in the absence of other and better evidence, the price paid for the real estate may be taken as representing such value.

It is incumbent upon a corporation, before it is entitled to call upon the court, to correct an assessment by increasing the sum to be deducted for the value of its real estate, to give evidence and furnish *data*, showing that the actual value exceeds the sum fixed by the assessors. It is not enough that the evidence raises a doubt or permits a conjecture that injustice may have been done.

The franchise of a corporation is not, within the tax laws, to be reckoned as realty. (1 R. S. 387, §§ 1, 2).

It seems, that corporate franchises are not, on general principles, to be considered as real property.

The commissioners of taxes, of the city and county of New York, in assessing the capital stock of relator, a domestic corporation, operating a railroad across the Isthmus of Panama under its charter and a grant of an exclusive right to construct and operate such a road, fixed the value of its real estate on the Isthmus at the amount paid out by it therefor, and in the construction of its road. The relator proved its net income for three years, including the one for which the assessment was made, and showed that the average income of those years capitalized, would produce a sum much larger than the value as so fixed by the commissioners. The relator claimed, that, by deducting from this sum the actual value of its personalty, the residue represented the value of its real estate. *Held*, untenable; that the value of the franchises of the corporation was an important element in determining the value of its road as a whole, or of its capital stock; that as the income of the relator is derived not only from the use of the real and personal property, but,

104 240
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also, from its franchises, it is impossible to ascertain, from proof of the income alone, the value of either element entering into the aggregate value of the corporate property; and therefore the evidence afforded no legal basis upon which the court could change or reduce the assessment.

(Argued November 23, 1886: decided February, 1, 1887.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made March 26, 1886, which affirmed an order of Special Term, dismissing a writ of *certiorari*, brought to review an assessment made by defendant, of the capital stock of the relator, a New York corporation, for the year 1882.

The material facts are stated in the opinion.

William G. Choate for appellant. The relator is entitled to show the actual value of its real estate, situated in the United States of Colombia. (95 N. Y. 562.) The testimony of the witness McCullough, taken by the referee and reported to the court, was competent evidence of the actual value of the real estate of the relator, and being uncontradicted and unimpeached, and not improbable in itself, the court was bound to give effect to it. (*People v. McCarthy*, 102 N. Y. 639; *Lomer v. Meeker*, 25 id. 361; *Elwood v. W. U. Tel. Co.*, 45 id. 549; *Koehler v. Adler*, 78 N. Y., 287.) The case is clearly one within the remedial scope of the act of 1880, chapter 269. (*People ex rel. Twenty-third St. R. R. Co. v. Com'rs of Taxes*, 95 N. Y. 554.)

James C. Carter for respondent. A party complaining of an assessment, cannot omit to avail himself of his opportunity to remedy his grievance by an application to the tax commissioners, and then, after the assessment has been confirmed by lapse of time, seek to arrest the collection of the tax, by a proceeding under the act of 1880. (*People ex rel. Mut. U. Tel. Co. v. Com'rs of Taxes*, 99 N. Y. 254.) By the writ of *certiorari* no error can be reached and corrected, unless it appears by the return to the writ. (*People ex rel. Becker v. Burton*, 73 N. Y. 452; *People ex rel. Sims v. B'd of Fire*

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Com'rs, 73 id. 437; *People ex rel. McCarthy v. French*, 25 Hun, 11.) For the purposes of deducting the actual value of the real estate, the assessed value of the real estate, when obtainable, is taken as the actual value. When not obtainable, such actual value must be proved by other means, ordinarily by the amount paid for it. (*People ex rel. Twenty-third St. R. R. Co.*, v. *Com'rs of Taxes*, 95 N. Y. 554; *Monroe Co. B'k. v. City of Rochester*, 37 N. Y. 365; *Mayor of Mobile v. Stein*, 54 Ala. 23; *Spring Valley W. Works v. Schotler*, 62 Cal. 69; *Mayor v. Balt. & O. R. R. Co.*, 6 Gill [Md.], 288; *Porter v. R. R. I. & S. L. R. R. Co.*, 76 Ill. 561; *Belo v. Com'rs Forsyth Co.*, 82 N. C. 415.) As an appendix to the respondent's points in *People ex rel. Twenty-third St. R. R. Co. v. Com'rs of Taxes* (95 N. Y. 554), are attached.

ANDREWS, J. The general rule for the taxation of corporations liable to taxation on their capital is prescribed in section 3, chapter 456, of the Laws of 1857, as follows: "The capital stock of every corporation liable to taxation, except such part as shall have been excepted in the assessment-roll, or as shall have been exempted by law, together with its surplus profits or reserved funds, exceeding ten per cent of its capital, after deducting the assessed value of its real estate, and all shares of stock in other corporations actually owned by such company, which are taxable upon their capital stock under the laws of this State, shall be assessed at its actual value, and taxed in the same manner as the other personal and real estate of the county." The words in this section, "except such part of it as shall have been excepted in the assessment-roll," are taken from section 10, title 4, of chapter 13 of the Revised Statutes, entitled "of the assessment and collection of taxes," and probably refer to stock of the corporation taxed, belonging to the State, or incorporated literary or charitable institutions, which the assessors by section 6, were required to specify in the fourth column of the assessment-roll and deduct from the amount of the capital stock. (See COMSTOCK J.; *People v. Commissioners of Taxes*, 23 N. Y. 192-223.) The further

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exception in the act of 1857, of such part of the capital stock "as shall have been exempted by law," refers to the general exemption in section 4, title 1, of the same chapter of the Revised Statutes. (See *DENIO, J.*, 23 N. Y. 195.)

Under the act of 1857, as now construed, the capital stock of a corporation, less the part thereof owned by the State, or by literary or charitable institutions, or exempted from taxation by the Revised Statutes, is to be assessed at its actual value, whether more or less than its nominal amount, deducting, however, from such actual value, the assessed value of its real estate and shares owned by it in other taxable corporations, and also from its surplus or reserved funds, if any, an amount not exceeding ten per cent of its capital. (*Oswego Starch Factory v. Dolloway*, 21 N. Y. 449; *People ex rel., Twenty-third St. R. R. Co. v. Commissioners of Taxes*, 95 id. 554.)

We understand it to be conceded by the learned counsel for the relator, that the Panama Railroad Company is subject to taxation under the act of 1857. It is a New York corporation operating a railroad across the Isthmus of Panama, under its charter and as assignee of a grant or concession to certain individuals of an exclusive right to construct and operate a railroad across the Isthmus, granted by the Republic of New Granada, and has its principal office and place of business in the city of New York. The question raised relates to the assessment of the corporation in the city of New York for the year 1882, and the specific and sole controversy upon the merits, is whether, upon the return to the *certiorari*, and the evidence taken in the proceeding under the order of the court, the commissioners of taxes, in making the assessment, deducted, from the actual value of the capital stock of the relator, the full value of its real estate. The nominal capital stock of the corporation is \$7,000,000. The commissioners fixed its actual value at the rate of one hundred and four per cent above its par value, making in the aggregate, \$14,280,000. From this aggregate they deducted \$700,000, being an amount equal to ten per cent. of the capital. They made a further deduction of \$8,922,870, the amount which the relator had paid out for

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its real estate on the Isthmus. There remained, after making these deductions, the sum of \$4,657,130, which sum was fixed by the commissioners as the amount of the assessment.

There was no error in the mode adopted by the commissioners of taxes in ascertaining the amount of the capital stock of the relator liable to assessment. It is true that the deduction on account of the real estate is not, in terms, of the assessed value. The legislature, in directing a deduction of the assessed value of the real estate, doubtless had primarily in view strictly domestic corporations carrying on business in this State, and whose real estate was located therein, and, therefore, subject to our assessment laws. But the assessed value of real estate is in theory its actual value, and where a corporation, liable to taxation, under the Law of 1857, has real estate in another State or country, the just construction of the statute, as applied to a corporation so situated, requires that the deduction shall be measured by its actual value; and the price paid for the real estate, in the absence of other and better evidence, may be taken as representing such value (EARL J., in *People ex rel. v. Com'rs of Taxes*, 95 N. Y., 554, 562.) It is insisted, however, that it was proved, by uncontradicted evidence, that the relator's real estate on the isthmus was worth at least the sum of \$15,000,000, a sum more than sufficient to offset the value of the capital stock of the company as ascertained by the commissioners, and which, if allowed, would have prevented any assessment whatever. This contention proceeds, we think, upon a false theory adopted by the relator for ascertaining the value of its real estate. The real estate consisted of a road-bed across the isthmus, one hundred feet wide, of real estate used for terminal facilities at Aspinwall and Panama, with the structures thereon, and of alternate sections of land on the line of the relator's road, granted by the local government. The cost of all the real estate purchased by the relator, was comparatively trifling, and the land granted by the government was, as appeared, of very little value. The sum of \$8,972,879, deducted by the commissioners of taxes, as the amount paid

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for real estate, represented in most part the sums expended by the relator in the construction of its road. There was no evidence given of the market value of the real estate at the time of the assessment. The sole proof upon which the relator rested its case was this: The relator proved the net income of the company from its traffic and business in 1880, 1881 and 1882. This was followed by showing that the average income of those years capitalized, would produce a sum exceeding \$15,000,000. The actual value of the locomotives, cars, equipment and other personal property of the company, was shown in round numbers to be \$1,000,000. It is assumed, from these premises, that the sum of \$15,000,000 represents the actual value of the real and personal property of the railroad company, and that the value of the real estate separately, is ascertained by deducting from the aggregate value, the sum of \$1,000,000, the value of the personal property. The evidence above referred to, is supplemented by proof that in 1881, a contract was entered into by the relator and its stockholders, for the sale to the Inter-Oceanic Canal Company, of a large part of the shares in the relator's company, at the price of \$250 a share, reserving to the old stockholders the money, personal securities and surplus belonging to the relator. It is also to be mentioned that the president of the relator testified in general terms that the real estate of the company was worth \$15,000,000, but this estimate, as subsequently explained, was based on the theory of capitalization of the income, to which we have referred.

We are of opinion that the evidence given afforded no legal basis upon which the court could change or reduce the assessment, or upon which it could find, as matter of fact, that the actual value of the real estate exceeded the sum allowed by the commissioners of taxes. It is unquestionable, that the value of the real estate of a railroad corporation, its road-way, tracks, structures, lands, and whatever is known as realty, enters into and forms a constituent element in the aggregate value of the capital stock. This is true of every species of

property having a value, owned by the corporation, whether real, personal, or mixed. But it is equally true that the value of the franchise of the corporation, is an important element in determining the value of a railroad as a whole, or the value of its capital stock. This is especially true when the franchise is an exclusive one, covering an important and necessary line of communication. It is impossible to doubt that the exclusive franchise of the Panama Railroad Company to construct and operate a railroad across the Isthmus of Panama, was a most important constituent in determining the value of the corporate property. It insured its productiveness and the continuance of a large income to the company from the operation of the road. The rental value of real estate is frequently resorted to as a guide in fixing its aggregate value. In many cases it is a reasonable assumption that real property is worth a capital sum equal to that represented by the capitalization of its ordinary net rental. So, also, the property of a railroad corporation may be worth a sum capitalized on the basis of its average income and earning capacity. But since the income is derived from the use of its real and personal property, and also of its franchise, it is manifestly quite impossible to ascertain, from proof of the income alone, the value of either element entering into the aggregate value of the corporate property. While it is not an unreasonable supposition that the real estate owned by the relator may be of greater value than the sum expended in its purchase and improvement, yet the relator gave no evidence upon which the court could determine that its actual value exceeded that sum, or as to the proportion the value of the real estate bore to the whole value of the corporate property. It was incumbent upon the relator, before it was entitled to call upon the court to correct the assessment, by increasing the sum to be deducted for the value of its real estate, to give evidence and furnish data showing that the actual value exceeded the sum fixed by the commissioners, and this the relator failed to do. (See *People ex rel., West F. I. Co. v. Davenport*, 91 N. Y., 574, 581, 583.) It was not enough that the evidence raised a doubt or permitted a con-

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jecture that injustice may have been done. There would be less difficulty in the relator's case, if it could be successfully claimed that the franchise of the relator was, within the tax laws, to be reckoned as a part of the realty. On general principles corporate franchises are not real property. They are classed as incorporeal hereditaments, though, as stated by Chancellor KENT (3 Kent, 459), with some impropriety, as they have no inheritable quality. They are defined by CLIFFORD, J., in *Society of Savings v. Coite* (6 Wall. 594, 606), as "legal estates vested in the corporation as soon as it is *in esse*." They are as varied as the purposes for which corporations are created. The relator, by its charter, was authorized to construct a railroad across the Isthmus of Panama under a grant made by the Republic of New Granada to certain individuals, and to that end to purchase the rights, privileges and immunities of the grantees under the grant. A franchise granted to a corporation to construct a railroad between certain termini, vests the moment the corporation is created. It may at that moment be of very great value, although the corporation owns not a foot of land and has not expended a dollar in money. When the road is constructed the franchise secures to the corporation the right to operate its road under the conditions and with the privileges conferred by the charter. But this does not give to the franchise the character of realty. It is an incorporeal right, annexed in some general sense to the road, when constructed, but is not a part of the land, nor an interest in land, although it may give to the land a greater value than it would otherwise have had. (See *Commonwealth v. Hamilton Manufacturing Company*, 12 Allen, 298.) But, independently of these general considerations, it is clear that under the definitions contained in the statutes of the State regulating taxation, the value of the relator's franchise cannot be included in the valuation of its real estate for the purpose of ascertaining the deduction to be made under the act of 1857. It is declared, in the first section of the chapter of the Revised Statutes relating to taxation (chap. 13,

tit. 1, § 1), that "all lands and personal estate within this State, whether owned by individuals or corporations, shall be liable to taxation, subject to the exemptions hereinafter specified." The second section declares that "the term 'land,' as used in this chapter, shall be construed to include the land itself, all buildings and other articles erected upon or affixed to the same, all trees and underwood growing thereon, and all mines, minerals, quarries and fossils, in and under the same, except mines belonging to the State; and the terms 'real estate' and 'real property' whenever they occur in this chapter shall be construed as having the same meaning as the term 'land,' thus defined." Section 3 declares that "the terms 'personal estate' and, personal property,' whenever they occur in this chapter, shall be construed to include all household furniture, moneys, goods, chattels, debts due from solvent debtors, whether on account, contract, note, bond or mortgage, public stocks and stocks in moneyed corporations. They shall also be construed to include such portion of the capital of incorporated companies, liable to taxation on their capital, as shall not be invested in real estate." It seems to admit of no doubt that the term "land," as defined in the second section does not include the franchise of a corporation. The act of 1857 does not enlarge its meaning as defined in the Revised Statutes. It simply makes the assessed value of the real estate the basis of deduction in place of the amount paid therefor, as provided in the prior law (Chap. 13, tit. 4, §§ 2, 6.) It is well recognized that corporate franchises may be made distinct subjects of taxation. They are regarded in tax laws as personal property, and are frequently so declared, as in chapter 761 of the Laws of 1866, in respect to the taxation of savings banks.

We have, for the reasons suggested, reached the conclusion that neither upon the facts presented to the commissioners of taxes, nor upon the additional evidence, was it made to appear that any error was committed by the commissioners in fixing the value of the real estate of the relator at the sum paid therefor. It must, however, be admitted that the rule

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of assessment and taxation declared in the statute of 1857, as applied to the relator, operates harshly and unequally. In respect to domestic corporations conducting their business and having their property within the State, it is just and equitable. The whole property of corporations so situated have the protection of our laws, and they are justly taxable upon its entire value, and double taxation cannot ordinarily happen. It can never happen except where some portion of their personal estate may be in another State or country, and is taxable under the laws of the foreign jurisdiction, a condition of things which would not ordinarily exist. In case the assessed value of the real estate of such corporations is more than its actual value, it results in a diminished taxation of its capital stock. If it is less, the equilibrium is restored by an increased taxation of its capital. So that practically the tax is levied only on the actual value of the property of the corporation within the State. But the relator stands in quite a different situation. It is liable to taxation on its real and personal estate in New Granada, and the case shows that nearly its whole property, real and personal, is within that jurisdiction, and that it pays an annual subsidy to that government of \$250,000, in lieu of taxes on its real estate, immunities and personal property. The injustice of taxing the corporation here, under the rules established by the act of 1857, is apparent. It results in double taxation on a great share of its taxable property, which is contrary to all just principles of taxation. It would seem that a franchise tax, and a tax on its real estate and its tangible personal property having its actual situs within our jurisdiction, and its credits, is all that in justice the State should exact from the relator as its contribution to the public burdens, and as the equivalent for the protection afforded. The act (Chap. 468 of the Laws of 1881) "to authorize, the formation of corporations for the purpose of acquiring, constructing and operating railroads in foreign countries," expressly provides (§ 13) that corporations, formed under the act, shall be "subject to taxation upon the amount of the real or personal

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property owned by such corporations within this State." It is not important to determine in this case whether this section was intended to abrogate the general rule prescribed by the act of 1857, as to corporations organized under the act of 1881. If so intended, it would seem to be a just rule to apply to the relator. But the remedy is with the legislature. It is only when a tax law transcends the legislative power that courts can interfere. This is not claimed in respect to the act of 1857. (See *People ex rel. Griffin, v. Mayor, etc.*, 4 N. Y. 419; *People ex rel. Jefferson v. Smith*, 88 id. 576; *Kirtland v. Hotchkiss*, 100 U. S. 491; *People v. Gold & Stock Tel. Co.*, 98 N. Y. 67.)

We do not understand the position that the act of the commissioners will subject the relator to a tax for State purposes, contrary to the provisions of chapter 361 of the Laws of 1881. The commissioners simply fixed the amount upon which the relator was taxable. They did not, so far as appears, lay a tax or determine for what purpose taxes might be levied.

Having reached a conclusion adverse to the relator on the merits, it is unnecessary to consider the questions of form and remedy argued by counsel.

The order appealed from should be affirmed.

All concur, except RUGER, Ch. J., and RAPALLO, J., dissenting.

Order affirmed.

104	250
123	405
104	250
126	368

104	250
162	518

In the Matter of the Judicial Settlement of the Accounts of
DAVID HAWLEY, as Testamentary Guardian, etc.

No jurisdiction is conferred upon the Surrogate's Court by the Code of Civil Procedure, or by previous statutes, to judicially settle the accounts of a testamentary guardian, either on his own application or on that of any other person, while the guardianship continues, and an attempted settlement of the kind, made either before or since the adoption of the Code is void for want of jurisdiction.

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It seems the Surrogate's Court has jurisdiction to settle such an account, only in the three cases specified in said Code (§ 2847), *i. e.*, where the ward has attained his majority; where he has died, and where the guardian has been superseded by a successor.

The provisions of the Code giving the Surrogate's Court authority, on the application of the infant, or of a relative on his behalf, to compel such a guardian to render and file an account annually (§§ 2855, 2842, 2845), are intended merely to inform that court as to the manner in which the guardian is discharging his trust, but do not authorize the judicial settlement of such intermediate accounts, or the allowance of commissions on such accountings.

S., by his will, divided his residuary estate into sixty parts, six of which he gave to his son A., an infant, *for his sole and separate use and benefit*; he appointed his executors, "guardians and trustees," of the ~~estate~~ of such of his children as should not be of the age of twenty-one at the time of his decease, to continue such until they should respectively arrive at that age. H., one of the executors named, alone qualified. *Held*, that he was not constituted by the will a trustee, within the meaning of the statute, but simply guardian, as the will created no trust, and that the statutory provisions in regard to the accountings of testamentary trustees were not applicable to him.

To constitute a testamentary trustee it is necessary that some express trust be created by the will; merely calling an executor or guardian a trustee does not make him such.

As a Surrogate's Court is one of inferior and limited jurisdiction, those claiming under the decree of a surrogate must show affirmatively his authority to make it, and the facts which give him jurisdiction.

The nature and extent of the jurisdiction of surrogates over testamentary trustees and guardians under the Revised Statutes, and under other statutes down to and including the Code of Civil Procedure, stated.

(Argued December 2, 1886; decided February 1, 1887.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made February 9, 1886, which affirmed a decree of the surrogate of the county of Westchester, on settlement of the accounts of David Hawley, as testamentary guardian, etc., of Adam M. Singer, under the will of Isaac M. Singer, deceased.

The material facts are stated in the opinion.

Charles E. Tracy for appellant. The illegality of the allowance of commissions complained of cannot be disputed.

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(*Mc Whorter v. Benson*, 1 Hopk. 36; *Morgan v. Hannas*, 13 Abb. [N. S.] 361; *Slosson v. Naylor*, 2 Dem. 257; *Meeker v. Crawford*, 5 Redf. 420; *Tyler v. Hunt*, id. 420.) There was no authority for allowing any commission whatever upon the Singer Manufacturing Company stock at any valuation. (*Hall v. Tryon*, 1 Dem. 276; *Schenck v. Dart*, 22 N. Y. 420; *Phoenix v. Phoenix*, 28 Hun, 629; 5 N. East R. 5; *In re Moffat*, 24 Hun, 325.) The decision upon the motion to open the accountings did not constitute *res adjudicata*. (*Riggs v. Pursell*, 74 N. Y. 270, 378; *Mathor v. Parsons*, 32 Hun, 338; *Met. E. R. Co. v. Manhattan R. Co.*, 14 Abb. [N. C.] 103, 215, 222.) The surrogate had full power under section 2481, subdivision 6 of the Code, "to open, vacate, modify or set aside * * * a decree of his court * * * for fraud * * * clerical error or other sufficient cause." (*Mandeville v. Reynolds*, 68 N. Y. 528; *Ferguson v. Crawford*, 70 id. 253, 266, 267; *In re Brick's Estate*, 15 Abb. 12; *Carpenter v. Kent*, 4 East. R. 580.) No consent on the part of the guardian *ad litem*, in respect to such a matter, binds the infant. It is beyond his authority. He is simply the officer of the court, having, as duty pure and simple, the examinations of the accounts presented to the court. (*Edsall v. Vandemark*, 39 Barb. 389; *Litchfield v. Burwell*, 5 Hun, 341; *Fisher v. Stilson*, 9 Abb. 33, 34.) Previous to the Code, a surrogate's decree upon an accounting by an executor or administrator was not conclusive as to the items allowed to the accounting party for commissions, etc. (Code of Civ. Pro., § 2742.)

James C. Carter for respondent. The term final accounting does not mean the last accounting, but a conclusive one as to matters embraced therein. (*Glover v. Holley*, 2 Bradf. 291; Redf. on Surrogates, 646.) The appellant herein having made a direct application to open the decrees which the surrogate then had, and the Court of Appeals now has denied, the decision rendered therein is binding and conclusive against him as to all matters of fact or of law, which actually were or might have been litigated therein, and he cannot again

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litigate those questions. (*Leavitt v. Woolcott*, 93 N. Y. 212; *Patrick v. Shaffer*, 94 id. 423; *Demorest v. Dary*, 32 id. 281; *Brown v. Mayor, etc.*, 66 id. 391.) Even if it is claimed that this is a different case from the one decided by the Court of Appeals because the amended objections alleged, and the answers to the questions excluded might have proven fraud (both of which claims are denied), the same thing was claimed, or might have been claimed, in the former proceeding, and the matter cannot be again litigated. (*Bruen v. Hone*, 2 Barb. 586; *Jordan v. Van Epps*, 85 N. Y. 436; *Le Guen v. Gouverneur*, 1 John. Cas. 436-492; *Riggs v. Pursell*, 74 N. Y. 370; *In re Tilden*, 98 id. 439.) The amended objections did not charge or raise an issue of fraud. The only possible new allegation in them that was not in the petition on the former application was that the two decrees on the accountings of the testamentary guardian and trustee were obtained by misrepresentation. The fact claimed to have been misrepresented is not stated. It is a mere conclusion of law, and does not raise an issue. (*Ross v. Wood*, 70 N. Y. 8; *McMurray v. Gifford*, 5 How. Pr. 14.) No decree shall be reversed for an error in admitting or rejecting evidence unless it appears to the appellate court that the exceptant was necessarily prejudiced thereby. (Code Civ. Pro. § 2545; *Snyder v. Sherman*, 88 N. Y. 656; *Brick v. Brick*, 66 id. 144; *Hone v. Pullman*, 72 id. 269; *Beach v. Sheldon*, 14 Barb. 66; *People's Bk. v. Bogart*, 87 N. Y. 101; *Shanks v. Shoemaker*, 18 id. 489; *In re Tilden*, 98 id. 434.) But if there was fraud, the decrees cannot be impeached in these collateral proceedings even for fraud. (*McRas v. Mattoon*, 15 Pick. 53; *McCarthy v. Marsh*, 5 N. Y. 263; *White v. Merritt*, 7 id. 352; *People v. Townsend*, 37 Barb. 520.) The bequest of the Singer Manufacturing Company's stock was not a specific legacy. (Redf. on Surrogates' Courts, 557; Roper on Legacies, 191, 192; *Tift v. Porter*, 8 N. Y. 516; *Walton v. Walton*, 7 John. Ch. 258; *Ovey v. Broadlent*, L. R. 20 Ch. Div. 678; *Young v. Carser*, 1 Dev. & B. [N. C.], 360; *Coleman v. Coleman*, 8 Ves. Jr. 641 [Sumner's note]; *In*

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re Pollock, 3 Redf. 100; *Osborn v. McAlpin*, 4 id. 1.) The testamentary guardian and trustee is entitled to commission upon the whole estate coming to his hands, even though he had received commissions on the same as executor. (*Laytin v. Davidson*, 95 N. Y. 203; *Thadbut v. Durant*, 88 id. 126; *In re Mason*, 98 id. 527; *Johnson v. Lawrence*, 95 id. 154; *Pirnie's Estate*, 1 Tuck. 119; *Cram v. Cram*, 2 Redf. 244.) These decrees have not been opened or vacated, and cannot be opened or vacated in these proceedings, and all objections on this accounting that referred to the accounts passed upon and settled by those decrees, could not be considered here, and were properly overruled or disallowed by the surrogate, and the decree appealed from was not erroneous in those respects. (*Weed v. N. Y. & M. R. R. Co.*, 29 N. Y. 616; *Douglas v. Day*, 3 Keyes, 434; *Doty v. Carolus*, 31 N. Y. 547; Redf. on Surrogates, 112, subd. 2; *Davis v. Clark*, 87 N. Y. 623; *In re Ross*, id. 514; *In re Will of Cottrell*, 95 id. 327.) The commissions on the profits or increased value of the United States bonds were correctly allowed. (3 R. S. [5th ed.], 179, § 63; id. 181, § 71, subd. 4; id. 182, § 79; *McWhorter v. Benson*, 1 Hop. R. 42; *Wagstaff v. Lowerre*, 23 Barb. 209.)

RAPALLO, J. Isaac M. Singer died July 23, 1875, leaving a will dated July 16, 1870, whereby, after making certain legacies, he divided all his residuary estate, real and personal, into sixty equal parts, and devised and bequeathed six of said parts, being one-tenth of his estate, to his son Adam Mortimer Singer, for his sole and separate use and benefit.

Adam Mortimer Singer was at the date of the decease of the testator an infant of the age of about twelve years.

The testator directed that should he continue to hold, at the time of his decease, the stock of the Singer Manufacturing Company, such stock should, in no event, be sold but should be divided by his executors, as near as might be, in the proportions indicated in the will. He appointed David Hawley and Charles M. Keller executors, and appointed his executors

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guardians and trustees of the estates of such of his legatees as should be under the age of twenty-one years at the time of his decease, to continue such guardians and trustees until said legatees should respectively arrive at that age. The will, however, contained no trust, but all the property devised and bequeathed was given directly to the legatees named.

The will was admitted to probate by the surrogate of Westchester county on the 10th of January, 1876. The principal item of the property left by the testator was forty-one thousand eight hundred shares of the capital stock of the Singer Manufacturing Company, the value of which was appraised at \$175 per share, amounting in the whole to \$7,315,000, of which the share of Adam M. Singer was \$731,500.

David Hawley qualified as executor, and as such rendered his account to the surrogate of Westchester county on the 12th of January, 1877, and petitioned for a final settlement of his account as executor. Citations were duly issued and a decree was made by the surrogate on the 31st of October, 1877, finally settling such account.

The executor was charged with \$9,651,521.85 of assets, including the forty-one thousand eight hundred shares of the stock of the Singer Manufacturing Company, amounting to \$7,315,000. He was credited with \$1,546,636.54 for expenses and payments, leaving in his hands the sum of \$8,104,885.31. Out of this balance he was allowed \$96,255 for commissions for receiving and paying out the whole principal.

The several distributive shares of the legatees were ascertained, and he was directed to retain and hold in his hands as testamentary guardian and trustee of Adam M. Singer, and to be accounted for by him as such testamentary guardian and trustee, his share of the cash assets remaining in his hands, and also one-tenth of the stock of the Singer Manufacturing Company left by the testator, until said Adam M. Singer should become of age.

In December, 1878, said Hawley presented to the surrogate of Westchester county his account as testamentary guardian and trustee of Adam M. Singer, in which he charged himself

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with the stock and money found to be in his hands by the decree entered by the surrogate on his accounting as executor, and also all the dividends and interest subsequently received, and he applied to said surrogate for a final settlement of such account. A citation was issued to Adam M. Singer, who was then still an infant and residing in Europe, and a special guardian was appointed for him for the purpose of taking care of his interest in that proceeding. A decree was afterwards entered by the surrogate on the 30th of December, 1878, purporting to finally settle and allow said account, and the guardian was by said decree again allowed full commissions for receiving and paying out the whole principal received by him for said infant, which was found to be \$1,040,600, the commissions amounting to \$10,581. The decree purported to finally discharge said Hawley from all accountability, except for the forty-one thousand eight hundred shares of stock and the United States bonds then held by him.

In December, 1880, the said Adam M. Singer being still an infant, said Hawley applied again to the surrogate for a judicial settlement of his accounts, as testamentary guardian and trustee, from the date of the last accounting and the passing of the same by the surrogate in December, 1878. He presented his account, which commenced by charging himself with the balance due from him December 30, 1878, being \$1,211,344.44. This account did not, on its face, disclose the fact that he had already received commissions, first as executor and again as testamentary guardian, on the principal of his ward's estate. A guardian *ad litem* was appointed for him by the surrogate on this second accounting, as guardian, and it is stated in one of the affidavits of Mr. Hawley that the guardian who represented him on this second accounting was a different person from the one who represented him on the former accounting. On this second accounting, a decree was made, on the 10th of January, 1881, judicially settling his accounts up to that time. By this decree Mr. Hawley was again allowed full commissions for receiving and paying out the whole principal of his ward's estate, including the stock of the Singer

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Manufacturing Company, which commissions amounted to the sum of \$12,288.

Adam M. Singer having become of age on the 25th of July, 1884, Mr. Hawley, in October of that year, presented a petition to the surrogate for a judicial settlement of his accounts as testamentary guardian and trustee, and asked to be discharged from all liability as such. On the hearing of this petition Mr. Singer appeared by counsel and objections were filed to the accounts rendered by Mr. Hawley. The account, as in the last proceeding, began by charging Mr. Hawley with the balance found in his hands by the decree of January 10, 1881, and it was objected on the part of Mr. Singer, that the balance was less than was properly chargeable to Mr. Hawley; that he had, without warrant of law, retained commissions upon the forty-one thousand eight hundred shares of the Singer Manufacturing Company's stock; that he had also retained commissions upon the principal for which he had accounted on the accounting of December 30, 1878; and likewise upon the principal for which he had accounted on the 10th of January, 1881, and that the balances had been improperly brought down by reason of such acts. On the hearing of these objections before the surrogate, the decrees upon the former accountings were relied upon by Mr. Hawley as conclusive on the question of his right to the commissions charged therein, and thereupon an amendment of the objections was asked for and granted, by which amendment the contestant claimed that the cash balance brought down was produced by means of deductions from moneys belonging to the estate for commissions allowed to the guardian and trustee by the court on the two former accountings, and that said two decrees were without the jurisdiction of the surrogate to grant, so far as the matter of commissions was concerned, and were obtained by misrepresentations on the part of said guardian and trustee, and those representing him, and that the matter of the commissions as allowed by said decrees was never, in fact, judicially investigated or determined by the surrogate.

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Under these objections, the contestant asked Mr. Hawley whether he did not draft the decree; whether there was any contest by the special guardian on the first accounting in respect to the amount of commissions; whether there was, in fact, any argument, or taking of evidence, in regard to that matter. The same question was asked in regard to the second accounting; and whether the fact was made known to the surrogate upon the second accounting, when the matter of the computation of commissions was on hand, that Mr. Hawley had already received full commissions upon the same principal fund for which he at that time asked for another allowance of full commissions.

These questions were severally objected to on the part of Mr. Hawley, on the ground that they were immaterial, irrelevant and incompetent, and all the objections were sustained and exceptions taken.

The decrees of December thirtieth and January tenth, being offered in evidence, Mr. Hawley was further asked whether on either one of the occasions when these decrees were entered, any statement or representation was made to the court in regard to the contents of the will of the testator respecting the shares of stock of the Singer Manufacturing Company. This question was objected to and excluded. The surrogate then proceeded to finally settle the accounts of the guardian, taking as the basis of the accounting the balance found due upon the settlement of January 10, 1881. He allowed to the guardian no commissions on the principal of the estate, but only on such increase as had come into his hands subsequent to the last accounting of January 10, 1881, which commissions amounted to about \$3,000, and he delivered an opinion reported in 3 Demarest's Report, 591, in which he conclusively showed that Mr. Hawley was not entitled to charge, as guardian or trustee, commission on the principal of his ward's estate more than once, a proposition too plain for discussion. The surrogate, in excluding the testimony offered by the contestant, for the purpose of impeaching the former decrees, expressed the opinion that it was an endeavor to do, indirectly, what the

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contestant had attempted to do directly, referring to an application which the contestant had made to open the decrees of December 30, 1878, and January 10, 1881, which he had denied on the ground of want of power, and which was afterwards passed upon by this court under the following circumstances. While the accounting of 1884, was in progress, the contestant presented a petition to the surrogate praying that the decrees of December 30, 1878, and January 10, 1881, might be set aside. That petition set forth the former accountings of Mr. Hawley as testamentary guardian, and alleged that the allowances of commissions made were erroneous, but made no charge of fraud or misrepresentation in procuring the decrees. It simply claimed that the allowances of commissions were erroneous, irregular, without warrant of law and beyond the jurisdiction of the surrogate to grant.

The surrogate denied the petition to vacate these decrees, on the ground, as stated in his opinion, that the case was not within section 2481 of the Code, as the proceedings were instituted before the Code of Civil Procedure went into effect, and that he had no power to grant a rehearing for errors of law, there being no charge of fraud. This order was reversed by the General Term of the Supreme Court on appeal, the ground taken by the General Term being that the decrees of the surrogate were void for want of jurisdiction.

When the case came before this court, it adopted the view of the surrogate, that the only mode of review of the errors of law was by appeal; and that there being no fraud or clerical error charged, the application was not authorized by section 2481 of the Code of Civil Procedure. The judgment of the General Term was therefore reversed, this court holding that the decrees should not have been vacated upon mere allegations in a collateral proceeding, that some of the determinations of the surrogate were erroneous as matter of law, without any proof, or even a suggestion in the petition, that any fraud or clerical error had been committed, or the existence of evidence newly discovered, or any other cause rendering such an order proper under section 2481 of the Code of Civil Procedure.

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With regard to the objection that the decrees were void for want of jurisdiction, this court said in its opinion, that if the views suggested, in that respect, by the General Term were correct, it was quite unnecessary to vacate the decrees for that reason, as they would not constitute a bar to any subsequent investigation of the guardian's accounts, but would be void.

The question whether the decrees can now be assailed, when set up as a bar to the objections made by the contestant to the double commissions retained by the guardian, is therefore unaffected by our decision in the previous case, and it is open to the contestants to attack the decrees, thus set up against him, either on the ground of fraud or want of jurisdiction. The charge of fraud in the objections, as amended, is not specific and is very general, but the exclusion of the evidence does not seem to have been placed upon the ground of any want of formality in the objections, and it is questionable whether it was necessary to make specific objections to the decrees for the purpose of avoiding them by proof of fraud, when they were set up against the contestant. (*Mandeville v. Reynolds*, 68 N. Y. 528, 543.)

It is very evident, from the subsequent action of the surrogate upon the subject, that had the facts been called to his attention, he would not have allowed the commissions on the principal, which were allowed for the second time in the accounting of January 10, 1881, for he disallowed them in the final accounting of 1884, although if they were properly allowed in 1881, it would have been proper to again repeat them in 1884, and the same reasons for which they were disallowed in 1884, existed against their allowance in 1881. The guardian knew that he had received these commissions on the accounting of December 30, 1878, and if he knew that he was not entitled to receive them again on the accounting of January 10, 1881, and intentionally withheld from the surrogate the information that he had received them on the previous accounting, no one can doubt that it would have been a fraud to obtain their allowance the second time, by

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concealing the fact that he had previously received them. The questions put to him on his examination before the surrogate in 1884, although not calling for facts which would have positively proved such a fraud, yet tended in that direction, and were, in my judgment, proper. It is perhaps possible to conceive that the guardian may have supposed himself entitled to commissions upon the principal every time he should render an intermediate account, which might be every year, and, therefore, was free from any actual fraudulent intent in claiming them in 1881. That was a question to be determined on all the proofs after they were in, but was no ground for excluding the evidence. His insisting on retaining the commissions, after he must have been advised by the subsequent proceedings, of the impropriety of thus duplicating and triplicating commissions on the principal, and his strenuous resistance even to an investigation of his right to them, cannot meet with our commendation in a controversy between guardian and ward.

But it is not necessary to sustain the proposition that the decrees were properly attacked on the ground of fraud in obtaining them, for there is another and conclusive ground for alleging error in the decree now appealed from.

It seems to have been assumed throughout the proceeding that Mr. Hawley was a testamentary trustee, and that the provisions in regard to accountings by testamentary trustees were applicable to him.

We think the assumption unfounded. To constitute a testamentary trustee it is necessary that some express trust be created by the will. Merely calling an executor or guardian a trustee does not make him such. Every executor and every guardian is, in a general sense, a trustee, for he deals with the property of others confided to his care. But he is not a trustee in the sense in which that term is used in courts of equity and in the statutes. (*Wood v. Brown*, 34 N. Y. 337; *Cleveland v. Whiton*, 31 Barb. 544.) It is said by Story (2 Eq. Jur., § 1330) that an attempt has been made to sustain the jurisdiction of the Court of Chancery over guardians of

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infants "by considering guardianship as in the nature of a trust, and that therefore the jurisdiction has a broad and general foundation, since trusts are the peculiar objects of equity jurisdiction. But this has been thought an overstrained refinement, for although guardianship may properly be denominated a trust, in the common acceptance of the term, yet it is not so in the technical sense in which the term is used by lawyers, or in the Court of Chancery."

As before remarked, the will of the testator does not purport to create any trust whatever. Nothing is bequeathed to his executors upon any trust, but his bequests are made directly to the legatees named, in every instance. He directs his executors to divide his residuary estate and pay over the several parts or portions as directed. He bequeaths to his son, Adam M. Singer, six of the sixty parts into which he directs his residuary estate to be divided, for his sole and separate use, benefit and behoof forever. He prohibits his executors from selling his stock in the Singer Manufacturing Company, but creates no trust in relation to it, and directs that it be divided by them in the proportions directed, as nearly as may be, contribution being made, if necessary, for the division. He then appoints his executors, guardians and trustees of the estates of such of the legatees as are under twenty-one years of age at the time of his death, to continue such guardians and trustees until such legatees shall respectively arrive at full age. As before observed, there being no trust declared in the will, the guardian became entitled to the property by virtue of his office of guardian, and the addition of the term trustee, it not being connected with any trust, had no effect upon the character in which he took the infant's share. A Surrogate's Court is a creation of the statute, of inferior and limited jurisdiction. Those claiming under the decree of a surrogate must show affirmatively his authority to make it, and the facts which give him jurisdiction. In respect to accountings by testamentary trustees or guardians, a surrogate takes no incidental powers or constructive authority by implication, which are not expressly given

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by statute. (*Wood v. Brown*, 34 N. Y. 337, 342; *Craig v. Craig*, 3 Barb. Ch. 76; *In re Woodworth*, 2 id. 351; *In re Andrews*, 1 John. Ch. 99; *Bulkley v. Van Wyck*, 5 Paige, 536.) Under the Revised Statutes surrogates had no jurisdiction to settle the accounts of testamentary trustees. In the general enumeration of their powers in 2 R. S. 220 (§ 1, subd. 3) they are declared to have jurisdiction to control the conduct and settle the accounts of executors and administrators only. An executor, although a trustee in a general sense, is not a trustee within the meaning of the statute (*Wood v. Brown*, 34 N. Y. 337; *Cleveland v. Whiton*, 31 Barb. 544), and the general powers of the surrogate do not embrace jurisdiction over testamentary trustees. (*Savage v. Olmstead*, 2 Redf. 478, 483; *Furniss v. Furniss*, id. 497.) To establish this jurisdiction particular statutes must be resorted to.

The first statute giving power to surrogates to settle the accounts of testamentary trustees was the act of 1850 (Laws of 1850, chap. 272) which amended 2 Revised Statutes 220, section 1, subdivision 3, so as to provide that any trustee appointed by any last will and testament, or appointed by competent authority to execute any trust created by any last will and testament, might from time to time render and finally settle his accounts before the surrogate of the county in which the will was proved.

This act was amended by chapter 115 of the Laws of 1866, by inserting a provision that on all such accountings by trustees, the surrogate should allow to the trustee or trustees the same commissions as were allowed by law to executors and administrators.

Thus far there was no provision authorizing the settlement of the accounts of testamentary guardians. The only guardians over whom surrogates had jurisdiction were guardians appointed by a surrogate. Provision was made for accountings by guardians thus appointed by 2 R. S., 152, §§ 11, 12, and by Laws of 1837 (chap. 460, §§ 54, 57, 58). By section 57, guardians appointed by surrogates' courts were required,

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annually, after their appointment, to file in the office of the surrogate who appointed them, an inventory and account under oath. By section 58 the surrogate was required to file, and in the month of February in each year to examine all such accounts and vouchers as should have been filed for the preceding year. By section 60 the surrogate was empowered to require a further account, or, if dissatisfied, to institute proceedings for the removal of the guardian. But there was no provision for the judicial settlement of these annual accounts, and it was held in *Diaper v. Anderson* (37 Barb. 168) that the statute did not contemplate a settlement of the annual accounts, but that they were merely intended to inform the court as to the manner in which the guardian was discharging his trust; and it was held in that case that there was no provision in the statutes for the judicial examination and settlement of a guardian's accounts during the continuance of the guardianship, and that there were only two cases in which the surrogate had jurisdiction to judicially settle the account of a guardian, at the instance of the guardian; and those were where he was permitted to resign his trust, or was superseded, and a new guardian appointed, or where the infant had arrived at his majority. (See 2 R. S. 152, §§ 11, 12, as amended by act of 1837.) In *Seaman v. Duryea* (11 N. Y. 324), the guardian had been superseded and was required to pay the balance in his hands to his successor. (See S. C. 10 Barb. 523.)

By the Laws of 1867 (chap. 782) jurisdiction was for the first time conferred on surrogates to settle the accounts of testamentary guardians. That act (§ 1), gave jurisdiction to surrogates to *compel testamentary trustees and guardians to* render accounts of their proceedings in the same manner as executors and administrators and *guardians appointed by such surrogates* were then required to account.

By chapter 482 of the Laws of 1871 this act was amended by authorizing the surrogate to require *testamentary trustees and guardians* to give security, and to remove them in the same manner as provided by law for requiring security from

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and removing executors, administrators or *guardians appointed by surrogates*. The Code of 1880 has substantially re-enacted these provisions, and added some that are new, but has carefully distinguished between testamentary *trustees*, testamentary *guardians* and *guardians appointed by surrogates*, and has provided a distinct system as to accountings by each. Chapter 18, title 1, section 2742, declares the general jurisdiction of surrogates' courts, in subdivisions, in the same form as the Revised Statutes (2 R. S. 220, § 1), but with additions, and omitting subdivision 8, which related to the admeasurement of dower. Subdivision 7 gives jurisdiction over guardians of infants "and in the cases *especially prescribed by law* to direct and control their conduct and settle their accounts," and concludes with the provision that "this jurisdiction must be exercised *in the cases and in the manner* prescribed by statute." Title 4 of the same chapter, article 2, provides for accountings by executors and administrators. Title 6 relates to testamentary *trustees* and provides for the manner of their accounting. Title 7, articles 1, 2, treats of guardians *appointed by surrogates* and accountings by them. Article 3 is entitled "*Guardians appointed by will or deed*," and contains provisions for accountings by them, which differ materially from the provisions for the accounting of testamentary trustees.

The same distinctions which were made in the Revised Statutes, and the amendments thereto, between *guardians* and testamentary *trustees*, and between guardians *appointed by surrogates* and guardians *appointed by will or deed*, are preserved in the Code of Civil Procedure. By section 2853, where a guardian of an infant's person or property has been appointed *by will or deed*, the infant or any relative on his behalf, may apply to the surrogate of the proper county to require the guardian to give security, and by section 2855, on the like application, the surrogate may at any time in his discretion, *compel such* a guardian to render and file an inventory and account in the same form as those required to be filed annually by guardians *appointed by the surrogate's*

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court, as prescribed in article 2 of the same title, and the surrogate may also order such inventory and account to be filed in the month of January in each year thereafter. Sections 2842 to 2845 are applied to these intermediate or annual accounts of *testamentary guardians*, but there is no provision for issuing citations on such accountings, or for the *judicial settlement* of such intermediate accounts, or the allowance of commissions on such accountings. By section 2844, the surrogate is required in the month of February in each year to examine such accounts for the purposes specified in the Code, which are (§ 2845) that if on such examination the interests of the infant appear to require it, the surrogate may order a further account, or may institute proceedings for the removal of the guardian. The provisions of the Code are the same in substance as those of the previous statutes, which were considered in the before cited case of *Draper v. Anderson* (37 Barb. 168), and which were therein held to be intended merely to inform the court as to the manner in which the guardian was discharging his trust, and not to confer jurisdiction upon the surrogate to judicially settle the guardian's accounts *while the guardianship continued*. The provisions of the Code appear to be framed with the view of harmonizing with that decision, and extending the jurisdiction of surrogates to the accounts of testamentary guardians, subject to the same principles which, under previous statutes, governed their jurisdiction over the accounts of guardians appointed by surrogates. Section 2856 empowers the surrogate's court to *compel* a judicial settlement of the account of a testamentary guardian in any case in which it may *compel* a judicial settlement of the account of a guardian appointed by it, and section 2857 gives to the decree, made upon the judicial settlement of the account of a testamentary guardian *as prescribed in this article* (Art. 3 of tit. 7, chap. 18), the same force as a judgment of the Supreme Court.

The only provisions authorizing the judicial settlement by the surrogate of the accounts of a guardian, whether appointed by will or by the surrogate, are contained in sections 2847,

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2848 and 2849 of article 2 of title 7, and the last above quoted section 2857 of article 3.

Section 2847 prescribes that a petition for the judicial settlement of a guardian's account may be presented to the surrogate in three cases only: *First*, by the ward after he has attained his majority. *Second*, by the executor, etc., of a ward who has died. *Third*, by the guardian's successor.

Section 2848 prescribes that a petition for the judicial settlement of the accounts of a general guardian of an infant's *person* may be presented in certain cases by the general guardian of the infant's *property*, and section 2849 provides that a general guardian may petition the Surrogate's Court for a judicial settlement of his accounts and a discharge from his liabilities, in any case where any *other* person is authorized by the *two next preceding sections* to petition for a judicial settlement of such accounts.

Section 2857 applies these sections to *testamentary guardians*, and it is thus plain that no jurisdiction is conferred upon the Surrogate's Court to judicially settle the accounts of a testamentary guardian, either on his own application or that of any other person, except in one of the three cases mentioned in section 2847, viz: *First*, when the ward has attained his majority. *Second*, when he has died. *Third*, when the guardian has been superseded by a successor.

The rule declared in *Diaper v. Anderson* (37 Barb. 168), therefore, still prevails, and an attempted judicial settlement by a surrogate of the accounts of a guardian appointed by the surrogate, or a testamentary guardian, made either before or since the adoption of the Code of Civil Procedure, but *while the guardianship continued*, is void for want of jurisdiction. (See *Bulkley v. Van Wyck*, 5 Paige, 536.)

There is good reason for this distinction between *testamentary guardians* and *testamentary trustees*. A trust in a will may endure during the whole life of the beneficiary and there may be reasons for judicially passing and settling the accounts of the trustee from time to time. But a guardianship necessarily terminates with the minority of the infant,

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and there is no reason for judicially settling the accounts of the guardian during the infancy of the ward, so as to conclude him. When the infant becomes of age, or the guardianship is otherwise terminated and a new guardian is appointed, or the infant dies, is the proper time for judicially settling the original guardian's account.

The result is that the decrees of December 30, 1878, and January 10, 1881, had no force or effect as adjudications, and all objections to the commissions and other charges in these accounts are open to the contestant. Whatever commissions are properly allowable should be determined on the final accounting, according to the law existing at that time; and if (in view of sections 2738, 2850, 2856, of the Code of Civil Procedure, and 5 New York, 430, and note to section 2738, a question which we do not now decide), the guardian is entitled to charge commissions, as *guardian*, on the principal, notwithstanding that he received them as *executor*, we think they are allowable upon the stock of the Singer Manufacturing Company.

The judgment of the General Term and the decree of the surrogate should be reversed and the matter sent back to the surrogate for a rehearing, without costs to either party.

All concur.

Judgment accordingly.

GEORGE LAHR, Respondent, v. THE METROPOLITAN ELEVATED RAILWAY COMPANY, Appellant.

In an action by an owner of real estate, abutting on a street in the city of New York, against a corporation operating an elevated railroad constructed over said street, to recover damages to his property occasioned thereby. *Held*, that the doctrine of the case of *Story v. New York Elevated Railroad Company* (90 N. Y. 122), although pronounced by a divided court, must be considered as *stare decisis* upon all questions involved therein, not only questions which it expressly decides, but such as logically come within the principles therein determined.

104	268
112	189
104	268
114	437
104	268
117	448
104	268
130	183
130	288
104	268
121	520
104	268
123	14
104	268
125	177
104	268
125	104
104	268
128	445
129	272
104	268
130	365
130	527
104	268
134	14

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The questions so determined stated as follows:

Abutters upon public streets in a city are entitled to such damages as they may have sustained by reason of a diversion of the street from the use for which it was originally taken, and its illegal appropriation to other and inconsistent uses.

An elevated railroad in a street of a city, supported by columns placed along the outer line of the sidewalks, and operated by steam power, is a perversion of the use of the street from the purposes originally designed, and is a use which neither the city authorities nor the legislature can legalize or sanction, without providing compensation for the injury inflicted upon property of abutting owners.

Abutters upon a public street of a city, claiming title to their premises by grant from the municipal authorities, which grant contains a covenant that a street to be laid out in front of such property shall continue forever thereafter as a public street, acquire an easement in the bed of the street for ingress and egress to and from their premises, and, also, for the free and uninterrupted passage and circulation of light and air.

The ownership of such an easement is an interest in real estate, constituting property within the meaning of that term as used in the Constitution of the State, and requires compensation to be made therefor before it can lawfully be taken for public use.

The erection and operation of an elevated railroad as aforesaid in the street, the use of which is intended to be permanent, constitutes a taking and appropriation of the easement by the railroad corporation rendering it liable to the abutters for the damages thereby occasioned.

Also *held*, that no legal difference exists with reference to the interest acquired by abutting owners in a public street in the city of New York, between that created by a grant from the municipality with a covenant as aforesaid, or that acquired through a series of *meane* conveyances from the original owner whose property was taken *in invitum* by the city, by proceedings under the act of 1813 (2 R. L. 49, § 177), to be held as prescribed by said act, "in trust, nevertheless, that the same be appropriated and kept open for and as a part of a public street * * * forever in like manner as the other public streets * * * in the said city are, or of right ought to be;" that said proceedings not only created a valid trust in the city which would preclude it from any other use of the land acquired than that expressly described in the statute, but, also, constituted a contract between the city and the owner which runs with the land, and enures to the advantage of each successive grantee thereof

Also *held*, that it was not essential to the acquisition of an abutter's rights in the street that any land should have been originally taken from him, as in any event he is a party to the proceedings to appropriate the land for the same and liable to be assessed for its benefits, and therefore entitled to enjoy them; that the contract created by the statute and proceedings applies to all persons entitled to be heard, and enures.

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d150 155

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equally to the benefit of all, although they may be unequally assessed for its cost.

Also *held* (RUGER, Ch. J.; ANDREWS and DANFORTH, JJ., concurring), that the railroad corporation was liable for the operation of its train and the consequences flowing therefrom in respect to the manufactures and distribution in the air of gas, smoke, steam, dust, cinders, ashes and other unwholesome and deleterious substances from its locomotives and trains.

No partial justification of the damages inflicted by an unlawful structure, and its unlawful use can be predicated upon the circumstance that under other conditions, and through a lawful exercise of authority, some of the consequences complained of might have been produced without rendering their perpetrator liable for damages (RUGER, Ch. J., ANDREWS and DANFORTH, JJ., concurring).

(Argued October 27, 1886; decided February 1, 1887.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made January 4, 1886, which affirmed a judgment in favor of plaintiff, entered on a verdict and affirming an order denying a motion for a new trial.

This action was brought to recover damages to plaintiff's premises abutting on Amity street in the city of New York, alleged to have been caused by the construction and maintenance of an elevated railroad over said street.

Amity street was laid out and opened in 1823, under the act of 1813, and the various acts amendatory and supplemental thereto. By the terms of said act the fee of lands taken for a street is vested in the city "in trust, nevertheless, that the same be appropriated and kept open for or as a part of a public street, * * * forever in like manner as the other public streets * * * of the said city are and of right ought to be."

The land through which Amity street was laid out then, belonged to John Ireland. It was taken by proceedings *in invitum*, and he was assessed for the benefit to his remaining lands the sum of \$425, over and above the sum awarded to him for the land taken. By plaintiff's deed he is bounded on the side of the street. Defendant's railroad is supported on iron columns about fifteen feet high, sixteen by twelve

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inches in size, placed just inside the outer edge of the sidewalk, on each side of the street. These support transverse girders extending across the street, and between them are longitudinal girders upon which the tracks rest. The highest part of the railway structure is nineteen feet nine inches above the surface of the street, and the part of the structure nearest to the building on plaintiff's lot is distant about ten feet therefrom. Trains drawn by locomotives, run by steam, pass over the road at short intervals during the day and night.

Further facts appear in the opinion.

David Dudley Field, Julien T. Davies and Edward S. Rapallo for appellant. Plaintiff can establish no cause of action without proving that some property has been taken from him by defendant. (90 N. Y. 143; Sedgw. on Stat. & Con. L. 519; Dillon on Mun. Cor. § 784; *Transp. Co. v. Chicago*, 99 U. S. 635; *O'Connor v. Pittsburgh*, 18 Penn. St. 187; *Hatch v. Vermont Cent. R. R. Co.*, 25 Vt. 49; *Richardson v. Same*, id. 473; *Radcliff's Ex'rs v. Mayor, etc.*, 4 N. Y. 195; *Bellinger v. N. Y. C. R. R. Co.*, 23 id. 42; *Brooklyn P'k Com. v. Armstrong*, 45 id. 234, 245.) The plaintiff does not own any easement of light, air and access in Amity street appurtenant to his lot abutting thereon, nor any private right of property in the street. (*Burbank v. Fay*, 65 N. Y. 65; *Wheeler v. Clark*, 58 id. 270; *Gilbert El. R. R. Co. v. Kobbe*, 70 id. 361; *Heyward v. Mayor, etc.*, 7 id. 314; *People v. Kerr*, 27 id. 188; *Brooklyn P'k Com. v. Armstrong*, 45 id. 234; *Nicoll v. N. Y. & E. R. R. Co.*, 2 Kern, 121; *De Varaigue v. Fox*, 2 Bl. C. C. 95; *Tyler v. Hammond*, 11 Pick. 193; *Un. Bur. Ground v. Robinson*, 5 Wheat. 21; *Jackson v. Hathaway*, 15 John, 447; *Fearing v. Irwin*, 4 Daly, 385; *English v. Brennan*, 60 N. Y. 609; *White's Bank v. Nichols*, 64 id. 65; *Kings Co. F. I. Co. v. Stevens*, 87 id. 287; *S. C.*, 101 id. 417.) The plaintiff failed to prove that the acts of defendant constituted any taking of his property, because he failed to show that the use of the street for the railroad of the defendant was other than a legitimate street

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use. (90 N. Y. 168, 174; *Brooklyn P^k Com. v. Armstrong*, 45 N. Y. 234; *Pensac. Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1; *People v. Kerr*, 27 N. Y. 188; *Kellinger v. Forty-second St. R. R. Co.*, 50 id. 206; *Fifth Nat. Bank v. N. Y. El. R. R. Co.*, 24 Fed. 114; *Board of Works v. U. K. Tel. Co.*, 51 L. T. R. 148.) The plaintiff can recover no damages occasioned by the running of the trains. (*Story v. N. Y. El. R. R. Co.*, 90 N. Y. 122, 146, 155, 159, 160, 161, 169-179.) The legislature has the right to authorize a steam railroad to be run through the streets of the city of New York, and if the road be placed upon the surface of the street, no compensation whatever need be paid to the owners of abutting property. (*People v. Kerr*, 27 N. Y. 188; *Kellinger v. Forty-second St. R. R. Co.*, 50 id. 206; *Drake v. H. R. R. R. Co.*, 7 Barb. 508; *Green v. Same*, 65 How. Pr. 154; *Williams v. N. Y. C. R. R. Co.*, 16 N. Y. 97; *Craig v. Rochester City & R. R. R. Co.*, 39 id. 404; *Washington County v. P. P. & C. I. R. R. Co.*, 68 id. 591; *Corey v. B. C. & N. Y. R. R. Co.*, 23 Barb. 482; *L. & O. R. R. Co. v. Applegate*, 8 Dana, [Ky.] 289; *A. & N. R. R. Co. v. Garside*, 10 Kan. 552; *Moses v. P. Ft. W. & C. R. R. Co.*, 21 Ill. 516; *Dwenger v. C. & G. T. R. Co.*, 98 Ind. 152; *Milburn v. C. of C. R. & C. I. & N. R. R. Co.*, 12 Ia. 246, 260; *C. L. R. R. Co. v. Cohen*, 50 Ga. 451; *Crowley v. Davis*, 63 Cal. 460.) As the legislature can authorize a railroad to run upon the surface of the street without compensation to abutting property owners, much more can they authorize one running above the surface and in no way interfering with the ordinary use of the street for street purposes. (*Bloodgood v. Mohawk R. R. Co.*, 18 Wend. 31; *People v. Flagg*, 46 N. Y. 401; *People v. Smith*, 21 id. 595; *Taylor v. Georgetown*, 6 Wheat. 59; *People ex rel. Griffin v. Mayor, etc.*, 4 N. Y. 415; *Smith v. Washington*, 20 How. 135; *People v. N. Y. C. & H. R. R. R. Co.*, 28 Hun, 543; *People v. Kerr*, 27 N. Y. 188; *Kellinger v. Forty-second St. R. R. Co.*, 50 id. 206; *City of Clinton v. R. R. Co.*, 24 Ia. 455; *Barney v. Keokuk*, 94 U. S. 324; *Elliott v. F. & W. R. R. Co.*, 32 Conn. 579; *Moses v. R. R.*

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Co., 20 Ill. 522; *Ind. R. R. Co. v. Hawley*, 67 id. 439; *Stetson v. R. R. Co.*, 75 id. 74; *Hutchinson v. Pal. R. R. Co.*, 7 N. J. Eq. 75; *Transp't Co. v. Chicago*, 99 U. S. 635; *R. R. Co. v. Garside*, 10 Kan. 532; *Brown v. Duplessis*, 14 La. 842; *Lesery v. R. R. Co.*, 51 Cal. 194; *Wallis v. P. & N. R. R. Co.*, 6 Whart. 25; Dillon on Mun. Cor., §§ 723, 725, 726; 90 N. Y. 170.) Claims against a corporation, arising out of its exercise of the powers conferred upon it by the legislature are confined to claims for taking property without making compensation, or for damages by reason of negligence or misconduct in the exercise of those powers. (Pierce on Railroads [1st ed.] 197-198; *Bellinger v. N. Y. C. R. R.*, 23 N. Y. 42; *Radcliff's Exr. v. Mayor, etc.*, 4 id. 195; *Gould v. N. Y. C. R. R. Co.*, 6 id. 522; *People v. Kerr*, 27 id. 193; *Brieson v. S. I. R. Co.*, 31 Hun, 112.) No evidence should have been admitted of emission of gas, odors, cinders, etc., from defendant's locomotives, and no damage occasioned thereby should have been recovered because plaintiff can have no property in the street, consisting of a right appurtenant to his land to have pure or unpolluted air furnished to his house from the street. (*Dark v. Johnston*, 55 Penn. St. 164; *Oliver v. Hook*, 47 Md. 301; *Hill v. Nipper*, 2 H. & C. 121; *Keppe v. Bailey*, 2 Myl. & K. 535; Goddard's Law of Easements [Bennett's ed.] 28, 29, 33; *Sampson v. Savage*, 1 C. B. [N. S.] 347; *Met. Ass. v. Petch*, 5 id. 504; *Cadgill v. Moore*, 9 C. B. 364; *Hewlins v. Shippam*, 5 B. & C. 229; *Rangeley v. Midland, etc.*, L. R., 3 Ch. App. 310; *Bliss v. Hall*, 4 Bing. [N. C.] 186; *Crumph v. Lampert* L. R. 3 Eq. 413.) To determine whether or not the acquisition of land for a street by the city under the act of 1813, has resulted in the existence of any easements or rights in the street belonging to the owners of abutting lands, is a matter of construction of the act. (*Heyward v. Mayor, etc.*, 7 N. Y. 314; *Brooklyn Pk. Com. v. Armstrong* 45 id. 234, 243.)

David Dudley Field for appellant. The decision in *Story v. New York Elevated Railroad Company*, (90 N. Y. 122).

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does not make a precedent which must be followed in subsequent cases differing in circumstances. (*Christy's Case*, 3 How. [U. S.] 292; *Butler v. Van Wyck*, 1 Hill, 438; *People v. Brooklyn*, 9 Bos. 543; *Carroll v. Lessee of Carroll*, 16 How. [U. S.] 287; *Tapner v. Merlott*, Willes, 177; *Evans v. Solly*, 9 Price, 541.) It was erroneous to admit in evidence the opinions of the witnesses produced as experts, because such witnesses were not qualified within the rules of evidence to state their opinions as proof in the cases. (*Dole v. Johnson*, 50 N. H. 452; *Jones v. Tucker*, 41 id. 548; 1 Greenl. Ev. [Redf. Ed.] § 440 a; *Carter v. Boehm*, 1 Smith's L. C. 286; Pothier's Civ. Proc., chap. 3, art. 3, § 1; *Boardman v. Woodman*, 47 N. H. 134; *Beard v. Kirk*, 11 id. 400; *Payn v. Parker*, 40 id. 59; *Luning v. State of Wisconsin*, 1 Chandler [Wis.], 183; *Lincoln v. Inhabitants of Bane*, 5 Cush. 590; *Clark v. Rockland Water Co.*, 52 Me. 76, 77; *Heald v. Thing*, 45 N. H. 394; *Clay v. Clay*, 2 Iredell, 78; *Norman v. Wells*, 17 Wend. 136; Bell on Expert Testimony, 11, 12; *Flynt v. Bodenhamer*, 80 N. C. 206, *Wiggins v. Wallace*, 19 Barb. 338; *Nelson v. Sun Mut. Ins. Co.*, 71 N. Y. 543.) The incidental damages due to the maintenance and operation of the road, such as those caused by odors, noise, cinders, etc., do not constitute a taking of property, and must not be included by commissioners in their award. (*In re N. Y. El. R. R. Co.*, 36 Hun, 427.)

Julien T. Davies for appellant. The plaintiff failed to prove that the acts of defendant constituted any taking of her property, or that the injuries complained of were due to a taking of property, for there is no evidence that the placing in the street of the railroad structure described in this action was a use of the street in excess of its legitimate street use. (*Story v. N. Y. El. R. R. Co.*, 90 N. Y. 143, 163, 168, 174; *Radcliff v. Mayor, etc.*, 4 id. 195; *Bellinger v. N. Y. C. R. R. Co.*, 23 id. 42; *People v. Kerr*, 27 id. 188; *Kellinger v. Forty-second St. R. R. Co.*, 50 id. 206.) It is essential to a recovery that plaintiff should found his action upon a taking

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of property, for, by the established law of the State, the legislature may authorize the construction of works of a public nature, without requiring compensation to be made to persons who may suffer damages occasioned by the construction or operation of such works, in case no property of such persons be actually taken or appropriated. (*Radcliff v. Mayor, etc.*, 4 N. Y. 195; *Bellinger v. N. Y. C. R. R. Co.*, 23 id. 42; *Smith v. Washington*, 20 How. [U. S.] 135; *O'Connor v. Pittsburgh*, 18 Penn. 187; *People v. Kerr*, 27 N. Y. 188; *Kellinger v. Forty-second St. R. R. Co.*, 50 id. 206; *Green v. N. Y. C. R. R. Co.*, 65 How. Pr. 154.) The amount of the damage was not, in this instance, a fact which the laws of evidence applicable to the case would allow the jury to infer from the general facts presented. The usual rule, that the amount of damage must be proved, applied to this case. (*Leeds v. Met. Gas-Light Co.*, 90 N. Y. 26; *Houghkirk v. D. & H. C. Co.*, 92 id. 224; *Bogert v. Burkhalter*, 2 Barb. 525; *Squier v. Gould*, 14 Wend. 159; *Chamberlaine v. C. & B. Co.*, 1 Exch. R. 870; *Rickett v. Met. R. R. Co.*, L. R. [2 H. of L. App. Cas.] 175.) No evidence should have been admitted as to the annoyance due to the noise of the cars, and the emission of gas, odors, cinders, etc., from the locomotives, and no damage occasioned thereby should have been recovered because plaintiff had no property right in the street consisting of a right or easement appurtenant to her land to have the street free from noise, or to have pure and unpolluted air furnished to her house from the street; and this, irrespective of the question whether or not the running of the trains is properly a street use of the roadway. (*Drake v. H. R. R. R. Co.*, 7 Barb. 546, 547; *Barney v. Keokuk*, 94 U. S. 324, 340; *People v. Kerr*, 27 N. Y. 188, 196, 202; *Story v. N. Y. El. R. R. Co.*, 90 id. 122; *Greene v. H. R. R. R. Co.*, 65 How. Pr. 154; *Hill v. Tupper*, 2 Hurl. & Colt. 121; *Keppel v. Bailey*, 2 Myl. & K., 535; *Goddard's L. of Eas.* [Bennett's ed.] 28, 33; *Simpson v. Savage*, 1 C. B. [N. S.] 347; *Met. Ass'n v. Petch*, 5 id. 504, 512; *Kadgill v. Moor*, 9 id. 364; *Hewlins v. Shippam*, 5 B. & C. 221; *Rangleley*

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v. *Midland, etc.*, L. R. [3 Ch. App.] 310; *Bliss v. Hall*, 4 Bing. [N. C.] 186; *Crumpp v. Lambert*, L. R. [3 Eq.] 413; *In re N. Y. El. R. R. Co.*, 36 Hun, 427, 434.) It was erroneous to admit evidence of inconvenience or damage incidental to the running of the trains through the street past the premises of plaintiff, because the operation of the trains, considered alone and separately from the erection of the structure, was a legitimate street use of the street to which all easements appurtenant to the abutting land were subject and subordinate. The plaintiff's recovery should not have included any damages due to the interference with light or the emission of odors, etc., occasioned by the passage of trains. (*Radcliff's Ex'r. v. Mayor, etc.*, 4 N. Y. 195; *Story v. N. Y. El. R. R. Co.*, 90 id. 154, 168; *People v. Kerr*, 27 id. 188; *Kellinger v. Forty-second St. R. R. Co.*, 50 id. 206; *Barney v. Keokuk*, 94 U. S. 324; *City of Clinton v. R. R. Co.*, 24 Ia. 455; *Taylor v. Man. R. R. Co.*, 50 N. Y. Supr. Ct. 311; *Green v. H. R. R. Co.*, 65 How. Pr. 154; *Fifth Nat'l Bk. v. N. Y. El. R. R. Co.*, MS.; *Plant v. L. I. R. R. Co.*, 10 Barb. 26; *Adams v. S. & W. R. R. Co.*, 11 Barb. 414, 450; *Drake v. H. R. R. Co.*, 7 id. 508.)

Edward S. Rapallo for appellant. Although an easement can only be acquired or transferred by a grant, it can be lost or destroyed without any conveyance or grant, differing in this respect from land itself. (*Lattimer v. Livermore*, 72 N. Y. 174, 182.) This whole litigation relates not to the value of property acquired, but to the amount of consequential damages claimed to be occasioned by the alleged destruction of rights, and consist of the depreciation in the fee value of the premises which must be satisfied by one recovery. (*Nicklin v. Williams*, Exch. Rep. [H. & G.] 259; *Benomi v. Backhouse*, 1 E. B. & E. Q. B. 622, 638, 640, 641, 654; 9 H. of L. Cases, 503; L. R. 3 Q. B. Div. 389, 393, 394, 399; *Mitchell v. D. & M. C. Co.*, L. R. 14 Q. B. Div. 125, 134; *Van Zandt v. Mayor, etc.*, 8 Bosw. 375, 388; *Langdon v. Mayor, etc.*, 93 N. Y. 129; *B. & P. Co. v. Reavey*, 42 Md.

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117; *Fowle v. N. H. R. R. Co.*, 107 Mass. 352; *Chicago v. Stein*, 75 Ill. 41; *Ulins v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98; *C. & O. C. Co. v. Hitchings*, 65 Me. 140; *Baldwin v. Calkins*, 10 Wend. 169; *Mahon v. N. Y. C.*, 24 N. Y. 658.) Neither trespass nor ejectment lie for interference with an easement. (*Applegate v. Morae*, 7 Lans. 59; *Bryan v. Whistler*, 8 Barn. & Cress. 288; *Wilson v. Wilson*, 2 Vt. 68; *Mainwaring v. Giles*, 5 Barn. & Ald. 361; *Clark v. School Board*, L. R. 9 Ch. Ap. 120.) When the value of the land and the consequential damages due to the taking or separation have been estimated, it was not proper for the commissioners to consider whether the land taken was afterwards to be occupied for a railroad or not. (*Albany R. R. Co. v. Lansing*, 16 Barb. 68; *Canandaigua & N. F. Co. v. Payne*, 16 Barb. 273; *Troy & B. R. R. Co. v. North T. Co.*, 16 Barb. 100; *Matter of Prospect Park*, 13 Hun, 345; *Black River & M. Co. v. Barnard*, 9 Hun, 104. *Matter of N. Y. El. R. Co. v. Story*, 36 Hun, 427, 434; *Met. B'd of Works v. McCarthy*, L. R. 7 H. of L. 243; *Caledonian R. v. Ogilvy*, 2 Macq. Rep. H. of L. 229; *Ricket v. Met. R. Co.*, L. R. 2 H. of L. 175.)

Inglis Stuart for respondent. Plaintiff had a cause of action. As abutting owner she had an easement right in West Third street to light, air and access. (*Peyser v. Met. El. R. Co.*, 12 Daly, 70; *Grafton v. B. & O. R. R. Co.*, 22 Fed. R. 309; *Rensselaer v. Leopold*, 106 Ind. 30.) This railroad does not lie within the description laid down in the surface case as being a street use. (*People v. Kerr*, 27 N. Y. 188, 193, 209; *Kellinger v. Forty-second St. R. R. Co.*, 50 id. 208.) -There is nothing in defendant's charter to place it within the description of the surface cases. (*Copeland v. Mem. & Char. R. R. Co.*, 3 Woods, 60, 66; *Coe v. C. Z. & C. R. R. Co.*, 6 Am. L. Reg. 27; *Pennington v. Coxe*, 2 Cranch, 33; *Henderson v. R. R. Co.*, 78 N. Y. 378.) The use of the structure was not a street use so far as to draw a distinction between the running of trains and the structure itself. The action stood in

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place of a condemnation proceeding. (*Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98.) The rule in this State considers both railroad operations on such proceedings. (*In re Utica R. R. Co.*, 56 Barb. 456; *In re R. R. Co. v. Judge*, 15 Hun, 63; *In re City of Rochester*, 40 id. 588; *In re N. Y. El. R. R. Co.*, 36 id. 427; *Bellinger v. N. Y. C. R. R. Co.*, 23 N. Y. 42; *In re U. C. & S. V. R. R. Co. v. Mening*, 56 Barb. 456.) There was no necessity for beginning by taking out an injunction against the trains. (*Troy, etc. R. R. Co. v. R. Co.*, 86 N. Y. 128; 1 Bouv. L. Dict. [4th ed.] 457.) A hereditament is real estate, and can only be conveyed as real estate is conveyed, viz., by grant. (1 R. S., 750 § 10; 2 Wash. on Real Property, § 25; Chap. 115, p. 125, Laws of 1807; *Henderson v. R. R. Co.*, 78 N. Y. 423.) Industries lawful in themselves are subjects for damage when they injure others, and it is for the jury properly instructed by the court, to say when they do or do not. (*Hutchins v. Smith*, 63 Barb. 299; *Campbell v. Seaman*, 63 N. Y. 299; *Carhart v. A. G. L. Co.*, 22 Barb. 297; Add. on Torts, 192; *Fish v. Dodge*, 4 Denio, 311.) The rule in other States and in England is the same as our rule. (*Walker v. R. R. Co.*, 103 Mass. 15; *Somerville, etc. R. R. Co. v. Doughty*, 22 N. J. L. 495; *R. R. Co. v. Hill*, 56 Penn. St. 460; *L. G. & W. Co. v. Moyer*, 99 id. 615; *Penn. R. R. Co. v. Duncan*, 111 id. 352; *Rigney v. City of Chicago*, 102 Ill. 64.) A railroad or other public work is liable to make compensation for the deterioration in the value of property caused by smoke, loss of privacy, jarring and increase of dust and noise, and any interference with the easement of access. (*In re S. T. & A. R. Co.*, 33 L. J. [Q. B.] 251; *Duke of Buccleuch v. Met. B'd. of W.*, 5 H. of L. Cas. 418; *Regina v. Essex*, Eng. L. R. [14 Q. B.] Div. 753; *Grafton v. B. & O. R. R. Co.*; *Zweig v. Same*, 21 Fed. Rep. 309; *Mollandin v. R. R. Co.*, 14 id. 394; *Setzler v. P. S. V. R. R. Co.*, 112 Penn. St. 50.) It was proper to sue for the permanent damages and not for the daily loss. (*Blanchard v. City of Kansas*, 16 Fed. Rep. 444.)

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G. Willett Van Nest for the New York National Exchange Bank and other property-owners. Successive actions of trespass or trespass on the case must be brought. (*Uline v. N. Y. C.* 101 N. Y. 98; *Brakken v. Minn.* 29 Minn. 41; *Sherman v. Milwaukee*, 40 Wisc. 645; *Cumberland v. Hitchings*, 65 Me. 140; *Ford v. Santa Cruz*, 59 Cal. 290; 1 Sedgw. on Measure of Dam. 296 [7th ed. note a]; *Arnold v. N. Y. C. R. R. Co.* 55 N. Y. 661.) The plaintiff has an interest in the street which must be paid for. (*Drucker v. Manhattan Co.*, 51 J. & S. 429; *Taylor v. Met.* 50 id. 311; *Ireland v. Met.* 32 Abb. L. J. 490, 491; *Dovaston v. Payne*, 2 Smith L. C.; 145; *Street R'y v. Cumminsville*, 14 O. St. 546; *Mahady v. Bushwick*, 91 N. Y. 153.) The plaintiff can recover for injury by smoke and noise, loss of privacy, etc. (Laws of 1850, chap. 140, § 18; *Sixth Ave. R. R. Co. v. Kerr*, 72 N. Y. 333; *In re Com'rs*, 56 id. 153-157; *Bloodgood v. Mohawk*, 18 Wend. 19; *People v. Hinsdale*, 2 Johns. 190; 1 Sedg. M. of Dam. [7th ed.] 34, 129, 291; *Ehrgott v. Mayor, etc.*, 96 N. Y. 281; *Elizabethtown v. Combs*, 10 Bush. 383; *Emery v. Lowell*, 109 Mass. 197; *Ill. C. R. R. Co. v. Grabill*, 50 Ill. 241; *Henderson v. N. Y. C. R. R. Co.*, 78 N. Y. 433; *Francis v. Schoellkopf*, 53 id. 152; *Brakken v. Minneapolis*, 31 Minn. 45; *Argotsinger v. Vines*, 82 N. Y. 308; *Beir v. Cooke*, 22 Week. Dig. 121.) In condemnation proceedings where the railroad is acting under legislative authority, and is not a wrongdoer the rule of damages is usually the same. (*In re Utica*, 56 Barb. 464; *Bangor v. McComb*, 60 Me. 290; *Adden v. Railroad*, 55 N. H. 413; *Keithsburg v. East*, 79 Ill. 290; *Little Rock v. Allen*, 41 Ark. 431; *Kansas City v. Kregel*, 32 Kan. 608; *Pittsburg v. Bentley*, 88 Penn. St. 178; *Buccleuch v. Met. L. R.*, 5 H. L. 458; *Lafayette v. Murdock*, 68 Ind. 137; *Colvill v. St. Paul*, 19 Minn. 283; *In re New York*, 15 Hun, 63; *In re N. Y. W. S. & B. R. R. Co.* 29 id. 611; *In re Prospect*, 13 id. 345; 16 id. 261; *In re N. Y. W. S. & B. R. R. Co.* 35 id. 262; *In re N. Y. L. & W. R. R. Co.* 27 id. 151; *In re N. Y. W. S. & B. R. R. Co.* id. 537.) The same rule is applied in

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taking easements as in taking absolute control of part of a piece of property. (*In re Poughkeepsie*, 63 Barb. 151; *In re Boston*, 31 Hun, 461.) Each cinder is a trespass as much as if the defendant poured water into the houses. (*Mairs v. Manhattan*, 89 N. Y. 498; *Seifert v. Brooklyn*, 101 id. 136; *Caro v. Met. El. R'y*, 46 J. & S. 165; *Trustees v. Thatcher*, 87 N. Y. 311; *Gale on Easements*, 483.) No distinction can be made between the trains and the structure. (*Mahady v. Bushwick*, 91 N. Y. 153.) A surface horse car being hardly distinguishable from an ordinary carriage, is a street use of a street in a large city. (*Kellinger v. Forty-second Street*, 50 N. Y. 206; *Craig's Case*, 39 id. 414; *Elliott v. Fairhaven*, 32 Conn. 586; *Hinchman v. Patterson*, 17 N. J. Eq. 75; *Texas v. Rosedale*, 22 Am. R'y Cas. 160; *Eichels v. Evansville*, 78 Ind. 267; *Jersey v. Jersey*, 20 N. J. Eq. 67; *Hanley v. Davenport*, 54 Ia. 475; *Brown v. Duplessis*, 14 La. An. 854.) A surface steam car being clearly distinguishable from a carriage because it emits smoke and creates noise is not a street use of a street. (*Williams N. Y. C. R. R. Co.*, 16 N. Y. 97; 78 id. 423; *Wager v. Troy*, 25 id. 526; *Mahon v. N. Y. C. R. R. Co.*, 24 id. 658; *Trustees v. Hill*, 3 Hill, 567; *In re Lewis*, 2 Wend. 472.) An adjoining owner has a right to have a street kept unobstructed above the level of the pavement except by such movable vehicles as have a reasonable height and are not objectionable in causing noise and in emitting smoke, steam, etc. (*Story v. N. Y. El. R. Co.* 90 N. Y. 122; *Mahady v. Bushwick*, 91 id. 153.) Any law which destroys property or its value, or takes away any of its essential attributes deprives the owner of his property. (*Gulf v. Fuller*, 63 Tex. 467; *Langdon v. Mayor, etc.*, 93 N. Y. 129; *In re Eleventh Ave.* 81 id. 436; *Sixth Ave. v. Kerr*, 72 id. 330.)

John E. Parsons, Joseph H. Choate, John W. Pursson, A. P. & W. Man, J. E. Burrill, Brownell & Lathrop, C. A. Davison for property owners. The *Story Case*, although decided by a divided court, became the law of the land. (*In re Gil. El. R. R. Co.*, 70 N. Y. 361, 376; *In re N. Y. El. R.*

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R. Co., id. 327.) Only such an estate can be taken from a property owner *in invitum*, as is necessary, or perhaps as shall be deemed by the legislature to be necessary for the public use. (*In re Albany St.*, 11 Wend. 149; *In re Cherry St.*, 19 id. 659., 667; *Embury v. Conner*, 3 Comst. 511; *Heyward v. Mayor, etc.*, 3 Seld. 314.)

Edward B. Whitney for property owners. The right to complain of a steam railway line in a city street, so far as it rests on constitutional principles, is not confined to owners of the fee of the street. (*R. R. Co. v. Schurmier*, 7 Wall. 272, 289; *Fanning v. Osborne*, 34 Hun, 121; *Cogswell v. N. Y., N. H. & H. R. R. Co.*, 103 N. Y. 10; *Story v. N. Y. El. R. R. Co.*, 90 id. 158, 159, 171-175; *In re Leiris St.*, 2 Wend. 472; *Livingston v. Mayor, etc.*, 8 id. 85; *Wyman v. Mayor, etc.*, 11 id. 486; *In re Furman St.*, 17 id. 650, 661, 662; *In re Thirty-second St.*, 19 id. 128; *In re Thirty-ninth St.*, 1 Hill, 191; *In re N. Y. El. R. R. Co.*, 36 Hun, 427; *Drake v. H. R. R. R. Co.*, 7 Barb. 508, 537, 555, 556, 557-559; *Williams v. N. Y. C. R. R. Co.*, 16 N. Y. 97, 101; *Greene v. N. Y. C. & H. R. R. R. Co.*, 12 Abb. [N. C.] 124; *Crittenden v. Wilson*, 5 Cow. 165; *Trans. Co. v. Chicago*, 99 U. S. 635, 640; 2 *Rapalje & Lawrence*, L. Dict. 885.) The elevated steam railroad cannot constitutionally be authorized in Amity street without compensation, and it has not, in fact, been so authorized. (*Story v. N. Y. El. R. R. Co.*, 90 N. Y. 147-149; *In re Lack. R. R. Co.*, 29 Hun, 1, 3, 4; L. R. [6 App. Cas.] 193.)

Roger Foster for property owners. It is not open to appellant to impeach the soundness of the decision in *Story v. New York Elevated Railroad Company* (90 N. Y. 122). (*Peyser v. Met. El. R. R. Co.*, 12 Abb. [N. C.] 276; *Glover v. Man. El. R. R. Co.*, 66 How. Pr. 77; *S. C.*, 19 J. & S. 1; *Drucker v. Man. R. R. Co.*, 19 id. 429; *Ireland v. Met. El. R. R. Co.*, 20 id. 450; *Greene v. N. Y. C. & H. R. R. R. Co.*, 12 Abb. [N. C.] 124; *Mahady v. Bushwick R. R. Co.*, 91 N. Y. 148, 153; *Uline v. N. Y. C. & H. R. R. R. Co.*,

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101 id. 98, 108; *Conklin v. N. Y., etc., R. R. Co.*, 5 East. R. 72, 73; *Newman v. Nellis*, 97 N. Y. 285, 290; *Scriven v. Smith*, 100 id. 471, 478; *In re Barclay*, 91 id. 430, 437; *Langdon v. Mayor, etc.*, 93 id. 129, 152; *Sejfert v. Brooklyn*, 101 id. 136; *Van Dolsen v. Mayor, etc.*, 17 Fed. R. 817; *Cohen v. Cleveland*, 43 Ohio St. 190; *B. & P. R. R. Co. v. Fifth Bap. Ch.*, 108 U. S. 317; 26 Alb. Law J. 322, 341; *In re N. Y. El. R. R. Co.*, 70 N. Y. 327, 360, 361, 367; *Bowen v. Preston*, 48 Ind. 367; *Bates v. Relyea*, 23 Wend. 336, 341; *Story v. N. Y. El. R. R. Co.*, 90 N. Y. 122, 195; *R. R. Co. v. Schutte*, 103 U. S. 118, 143; *Dartmouth College v. Woodward*, 4 Wheat. 518; *Perry on Trusts*, §§ 260, 263.) The measure of compensation for property taken for the use of a railroad is the difference between the value of the whole tract of property before the building of the road and the remnant after the road is in operation, taking into account incidental damages from noise, vibration, smell, smoke, cinders and all other injuries. (*Story v. N. Y. El. R. R. Co.* 90 N. Y. 142, 169, 178; *In re Utica C. & S. V. R. R. Co.*, 56 Barb. 456, 464; *T. & B. R. R. Co. v. Lee*, 13 id. 169, 171; *In re Furman St.*, 17 Wend. 649, 670; *In re N. Y. C. & H. R. R. R. Co.*, 15 Hun, 63, 67, 69; *In re N. Y. Lack. & W. R. Co.*, 29 id. 1, 4; *In re N. Y. C. & H. R. R. R. Co.*, 6 id. 149, 154; *In re N. Y. El. R. R. Co.*, 36 id. 427; *Williams v. N. Y. C. & H. R. R. R. Co.*, 16 N. Y. 103; *Henderson v. N. Y. C. & H. R. R. R. Co.*, 78 id. 423; *In re N. Y. L. & W. R. R. Co. v. Bennett*, 7 N. E. R. 559; *Walker v. O. C. N. H. Co.*, 103 Mass. 10, 15; *S. & E. R. R. Co. v. Doughty*, 2 Zab. [N. J.] 495; *J. M. & I. R. R. Co. v. Esterle*, 13 Bush. [Ky.] 667, 668; *Harding v. Board of Land and Works*, L. R. [11 App. Cas.] 208, 213.) The fact that an easement only is taken can cause no variance of the rule. (*Arnold v. H. R. R. R. Co.*, 55 N. Y. 661; *Story v. N. Y. El. R. R. Co.*, 90 id. 122; *Cohen v. Cleveland*, 43 Ohio St. 191, 194; *V. & T. R. R. Co. v. Lynch*, 13 Nev. 92, 96; *C. B. U. P. R. R. Co. v. Andrews*, 26 Kan. 702; *C. B. U. P. R. R. Co. v. Twine*, 23

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id. 585; *Buccleugh v. Met. Board of Works*, L. R. [5 H. L. C.] 418, 452, 453; *Yeaton's Appeal*, 105 Pa. St. 125; *Taylor v. Met. El. R. R. Co.*, 18 J. & S. 311; *Drucker v. Man. R. R. Co.*, 19 id. 429; *Ireland v. Met. El. R. R. Co.*, 20 id. 450.) The defendant's contention that they are not liable for the necessary consequences of the operation of its road is untenable. (*Seifert v. Brooklyn*, 101 N. Y. 136, 143, 144; *B. & P. R. R. Co. v. Fifth B. C.*, 108 U. S. 317, 332; *Eaton v. B. O. & M. R. R. Co.*, 51 N. H. 504, 516; *Penn. R. R. Co. v. Angel*, 6 East. R. 353, 354, 355; *Rez v. Pease*, 4 B. & Ald. 30; *Vaughan v. Taff Vale R. R. Co.*, 5 H. & N. 679; *Powell v. Fall*, 5 Q. B. D. 597-601; *Eaton v. B. O. & M. R. R. Co.*, 51 N. H. 504, 516.) There is no difference in principle between the rights of one who has a fee in the land beneath a city street and those who only own to the line of the streets of New York city. (*R. R. Co. v. Schurmeier*, 7 Wall. 272; *Trans. Co. v. Chicago*, 99 U. S. 635, 641; *Livingston v. Mayor, etc.*, 8 Wend. 85, 99; *Wyman v. Mayor, etc.*, 11 id. 486; *In re Furman St.*, 17 id. 650, 661, 662; *In re Thirty-second St.*, 19 id. 128; *In re Thirty-ninth St.*, 1 Hill, 191.) The loss of light, which is an element of damage, includes the loss of light reflected from the street as well as the loss of direct rays. (*Scott v. Pape*, 31 Ch. D. 554, 568, 573.) Abutters in their trials before a jury against the elevated railway companies can recover no damages beyond the injury to the use of their property from the building of the elevated roads to the commencement of their respective actions. (*Uline v. N. Y. C. & H. R. R. R. Co.*, 101 N. Y. 98; *Darley Main Colliery Co. v. Mitchell*, L. R. [11 App. Cas.] 127.) The plaintiffs are not obliged to prove their damages with precision. (*Schile v. Brockhahus*, 80 N. Y. 614; *Taylor's Case*, 18 J. & S. [50 N. Y. Supr. Ct.] 311; *In re U.*, etc., *R. R. Co.*, 56 Barb. 456, 464; 1 Suth. on Dam. 121; *B. & P. R. R. Co. v. Fifth Bap. Ch.*, 108 U. S. 317, 335; *Blesch v. C. & N. W. R. R. Co.*, 43 Wis. 183, 195; *Steers v. Brooklyn*, 101 N. Y. 51, 57, 58; *Wakeman v. W. & W. M. Co.*, id. 205, 209.) Abutters are entitled to recover at least

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the depreciation in the rental value of their property whether they occupied or leased it. (*Carl v. S. & F. du L. R. R. Co.*, 46 Wis. 625, 631, 632; *B. & P. R. R. Co. v. Fifth Bap. Ch.*, 108 U. S. 317, 323, 335; *Francis v. Schoellkopf*, 53 N. Y. 152.) Juries are entitled to award abutters exemplary damages. (*B. & P. R. R. Co. v. Fifth Bap. Ch.*, *supra*; *Buccleugh v. Met. Board of Works*, L. R. [5 H. L. C.] 418, 454.)

Simon Sterne for property owners. The operation of a steam railway on a public highway or street is not the ordinary use of such street, and is *per se* a nuisance. (*Washington Cemetery v. P. P. & L. I. R. R. Co.*, 68 N. Y. 591; *Strong v. City of B.*, *id.* 1; *Hurd v. City of B.*, 60 *id.* 24; *R. R. Co. v. Williamson*, 91 *id.* 55; *Uline v. N. Y. C. R. R. Co.*, 101 *id.* 98.) The plaintiff is entitled to compensation for the injury sustained by reason of the defendant's structure, although an act of the legislature had authorized the building of the defendant's railroad. Its right to vindictive damages for the willful erection and maintenance of a nuisance falls to the ground by the legislative authority given to the defendant to build its railway, but no other right is, or under the Constitution can be impaired by the authority granted to build such railway. (*Buccleugh v. Met. B. of Works*, 5 L. R. [H. of L. Cas.], 404; *S. C.*, 2 Moak's Eng. R., 473; *Henderson v. N. Y. C. R. R. Co.*, 78 N. Y. 423; *Story v. N. Y. El. R. R. Co.*, 90 *id.* 124, 162; *Ill. C. R. R. Co. v. Graybill*, 50 Ill. 211-246; *Phillips v. London*, 5 L. R., C. P. D. 286, 290; *Pittsburg v. Bentley*, 88 Pa. St. 178.)

Wm. W. Badger for property owners. The settled rules as to actions for damages by nuisance should be applied, as there can be no pretense that any express legislation has authorized the running of the trains, or even the building of the structure, except conditionally upon payment for the right of way wherever it affects private interests. (68 N. Y. 597; *Uline v. N. Y. C. & H. R. R. R. Co.*, 101 *id.* 107, 123; 50 J.

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& S. 323; *B. & P. R. R. Co. v. Fifth Bap. Church*, 108 U. S. 323, 335; *Taylor's Case*, 18 J. & S. 323; 3 Wall. 57; *Chenango Bridge Co. v. Paige*, 83 N. Y. 183-185; *Cogswell v. N. Y. & N. H. R. R. Co.*, 103 id. 10; *Fish v. Dodge*, 4 Den. 311; *Jutte v. Hughes*, 67 N. Y. 272.) There was error in the charge in limiting the damages without allowing for the injuries which were caused by the stench and smell, which necessarily would seriously affect the use of the property and constitute an important item of the damages incurred. (*Schille v. Brockhahus*, 80 N. Y. 614; *St. John v. Mayor, etc.*, 6 Duer, 315; *Mairs v. Manhattan*, 89 N. Y., 498; *Hay v. Cohoes Co.*, 2 id. 159; *Francis v. Schoellkopf*, 53 id. 153.)

Charles E. Whitehead for property owners. The owners of city property abutting on a street are entitled to recover from an elevated railroad company that occupies the street any damages occasioned to them by the deprivation of light, air and access. (*Story Case*, 90 N. Y. 122; *Caro v. Met. El. R. R. Co.*, 46 Sup. Ct. 138; *Peyser v. Same*, 12 Abb. [N. C.] 276; *Hyne v. N. Y. El. R. R. Co.*, 36 Hun. 296; *Taylor v. Met. El. R. R. Co.*, 50 Sup. Ct. 311; *Drucker v. Same*, 51 id. 430; *Ireland v. Same*, Daily Reg. Dec. 29, 1885; *Meyer v. Same*, id. Apr. 1, 1886; *Fifth Nat. Bk v. N. Y. El. R. R. Co.*, 24 Fed. Rep. 114; *Glover v. Man. R. R. Co.*, 66 How. Pr.; 51 Sup. Ct. 1; *Met. Tel. Co. v. Colwell L'd Co.*, 67 id. 365; *Mahady v. Bushwick R. R. Co.*, 91 N. Y. 153; *Fanney v. Osborn*, 37 Hun. 121; *Cohen v. Cleveland*, 1 West. Rep. 60; *Minning v. N. Y. C. & St. L.* 11 Week. Notes, 297; *Duncan v. Penn. R. R. Co.*, 13 Norvis, 435; *P. & L. E. R. R. Co. v. Bruce*, 12 id. 554; *Patten v. N. Y. El. R. R. Co.*, 3 Abb. [N. C.] 306; *In re N. Y. El. R. R. Co.*, 43 Hun. 427; *Jackson v. Blanshaw*, 6 John. 58; *Green v. Hudson R. R. R. Co.*, 28 Barb. 22.) The party injured may either recover the loss of rent or other injuries up to the time suit was begun, or, when the injury is permanent, and there has been no condemnation, he can

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recover the loss of actual value in the premises occasioned by the injury complained of. (Wood's Ry. Law, 790.) His executor by statute may maintain such suit after his death. (R. S., part 11, chap. 6, tit. 5, § 4; *Blodgett v. Utica R. R. Co.*, 64 Barb. 580; *Henderson v. N. Y. C. R. R. Co.*, 78 N. Y. 434; *Green v. Same*, 65 How. 154; *Lehigh Val. R. R. Co. v. McFarlan*, 43 N. J. 605; *Stodghill, v. C. B. & Q. R. R.*, 53 Ia. 341; *City of Denver v. Bayer*, 7 Col. 113; *Troy v. Cheshire R. R. Co.*, 23 N. H. 83; *R. R. Co. v. Hambleton*, 40 O. St. 497; *Chi. & Pac. R. R. Co. v. Stein*, 75 Ill. 42; *C. & Alt. R. R. Co. v. Maher*, 91 id. 317; *Kansas Pac. R. R. Co. v. Milman*, 17 Kan. 224; *Lord Oakley v. Kensington C. Co.*, 5 B & A. 138; *Great Laxey Mining Co. v. Clague*, 27 W. R. 417; *Blair v. St. L. H. & K. R. R. Co.*, 24 Fed. Rep. 539; Sedgwick on Dam. [7th ed.] 296; Add. on Torts, §§ 194, 195, 421.) The measure of damages in this case is the difference in value of the premises with and without the erection and operation of the elevated railway in front of it. (*West. Penn. R. R. Co. v. Hill*, 6 P. F. Smith, 460; *In re U. C. & S. V. R. R. Co.*, 56 Barb. 456; *In re N. Y. C. & H. R. R. Co.*, 15 Hun, 63; *In re N. Y. L. & W. R. Co.*, 29 id. 1; *Green v. N. Y. C. & H. R. R. Co.*, 65 How. Pr. 154; *B. & P. R. R. Co. v. Reany*, 42 Md. 127; *Eaton v. B. C. & M. R. R. Co.*, 51 N. H. 504; *Bucclough v. Met. B'd of W'ks*; 5 H. L. C. 418; *Mairs v. Man. R. E. Ass'n.*, 89 N. Y. 589; *St. Peter v. Denison*, 58 id. 416; *B. & P. R. R. Co. v. Fifth Bap. Ch.*, 108 U. S. 517; *Dusenbury v. Mut. Tel. Co.*, 11 Abb. [N. C.] 440; Cooley on Const. Lim., 702; 2 Kent's Com. 339.) The pollution of air by gas, smoke, dust and cinders is a deprivation of air, to the extent to which it is rendered useless to the abutting owner in his accustomed use. (*In re N. Y. C. & H. R. R. Co.*, 15 Hun. 63; *Cohen v. Cleveland*, 1 West. Rep. 60; *P. & L. E. R. R. Co. v. Bruce*, 12 Week. Notes, 554; *In re N. Y. El. R. R. Co.*, 36 Hun. 427.) The defendant is liable for all the continuing damage consequent upon a trespass which it has built and transferred to

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another, so long as it is maintained by the defendant's consent. (1 Add. on Torts, § 422; *Thompson v. Gibson*, 7 M. & W. 456; *Brown v. C. & S. R. R. Co.*, 12 N. Y. 486; *People v. Erwin*, 4 Denio, 129; *R. R. Co. v. Hambleton*, 40 O. St. 497.)

RUGER, Ch. J. This action is the sequel of the *Story Case* (*Story v. N. Y. El. R. R. Co.*, 90 N. Y. 122), and its defense seems to have been conducted, upon the theory of securing a re-examination of the questions then decided, and in case that effort should prove fruitless, of limiting and restricting as much as possible, their logical effect.

The endeavor to secure a re-examination of the doctrines of that case must fail, since the decision there made embodied the deliberate judgment of the court, pronounced after the most careful and thorough consideration, and after two arguments at the bar, made by most eminent counsel, had apparently exhausted the resources of learning and reason in the discussion of the questions presented.

It would be the occasion of great public injury, if a determination thus made could be inconsiderately unsettled and suffered again to become the subject of doubt, and theme of renewed discussion.

The reasons advanced by the able counsel for the appellant to induce us to reconsider that case, seem to us to be insufficient to render it wise or expedient to do so. The doctrine of the *Story Case* therefore, although pronounced by a divided court, must be considered as *stare decisis* upon all questions involved therein, and as establishing the law, as well for this court as for the people of the State, whenever similar questions may be litigated.

Wherever, therefore, the principles of that case logically lead us we feel constrained to go, and give full effect to the rule therein stated, that abutters upon public streets in cities are entitled to such damages, as they may have sustained by reason of a diversion of the street, from the use for which it was originally taken, and its illegal appropriation to other and inconsistent uses.

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The case is not only authority upon the questions which it expressly decides, but also upon all such as logically come within the principles therein determined.

It is therefore unnecessary to enter into a general discussion of those questions, but after restating such propositions as seem to be controlling in this case, we shall simply refer to some alleged distinctions between the present case and the *Story Case*.

We hold that the *Story Case* has definitely determined :

First. That an elevated railroad, in the streets of a city, operated by steam power and constructed as to form, equipments and dimensions like that described in the *Story Case*, is a perversion of the use of the street from the purposes originally designed for it, and is a use which neither the city authorities nor the legislature can legalize or sanction, without providing compensation, for the injury inflicted upon the property of abutting owners.

Second. That abutters upon a public street claiming title to their premises by grant from the municipal authorities, which contains a covenant that a street to be laid out in front of such property, shall forever thereafter continue for the free and common passage of, and as public streets and ways for the inhabitants of said city, and all others passing and returning through or by the same, in like manner as the other streets of the same city now are or lawfully ought to be, acquire an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air through and over such street for the benefit of property situated thereon.

Third. That the ownership of such easement, is an interest in real estate, constituting property within the meaning of that term, as used in the Constitution of the State, and requires compensation to be made therefor, before it can lawfully be taken from its owner, for public use.

Fourth. That the erection of an elevated railroad, the use of which is intended to be permanent, in a public street, and upon which cars are propelled by steam engines, generating

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gas, steam and smoke, and distributing in the air cinders, dust, ashes and other noxious and deleterious substances, and interrupting the free passage of light and air to and from adjoining premises, constitutes a taking of the easement, and its appropriation by the railroad corporation, rendering it liable to the abutters for the damages occasioned by such taking.

The jury in this case, under the instructions of the court, have found, upon evidence which justifies the finding, that the structure of the defendant in Amity street, in connection with the running of cars thereon, propelled by steam engines with the consequences naturally flowing therefrom, constitutes an employment of the street for purposes not originally designed and a perversion of its use, from legitimate street purposes.

Assuming, therefore, the binding force of the decision in the *Story Case*, we will, where they are raised by sufficient exceptions, proceed to examine some distinctions claimed by the appellant to exist between the cases.

Among other things, it is claimed that the *Story Case* is an authority only where abutting owners hold title to their property, under conveyances similar to that of *Story's*, and that abutters claiming under any other tenure, than that of a deed from a municipality containing covenants protecting the street from any other use than that of a public street, do not come within the principles there determined.

This claim, we think, is not well founded.

We are of the opinion that no legal difference exists, with reference to the interest acquired by abutting owners in a public street, between that afforded by a title conferred under such a deed as *Story* had, or that acquired through a series of *mesne* conveyances from the original owner, whose property had been taken by proceedings *in invitum* instituted by the municipality, under a public statute to acquire land for street purposes, which statute provided that the land thus taken should be held "in trust, nevertheless, that the same be appropriated and kept open for or as part of a public street * * * forever, in like manner as the other public streets * * * in the said city are, and of right ought to be."

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Such proceedings created not only a valid trust in the city for the purposes expressed, which precluded it from authorizing any other use of the land acquired, than that expressly described in the statute (Cooley on Const. Limitations, 331), but also constitute a contract between the public and the abutting owners severally, by which the liabilities, rights and interests of the respective parties are to be measured, and the enjoyment of their respective interests in the property (retained as well as acquired) regulated and determined. (*Shephard v. Mayor, etc.*, 13 How. Pr. 286; *Matter of Com'rs of Wash. Park*, 56 N. Y. 144; *Matter of Rhinebeck and Conn. R. R. Co.*, 67 id. 242.)

It is not essential to the acquisition of an abutter's rights that any land for the bed of the street should have been actually taken from the original owner, for whether it be so or not he was a party to the proceedings to appropriate the land, for a street and liable to be assessed for its benefits, and therefore entitled to enjoy them. (*Upham v. Worcester*, 113 Mass. 97.) He acquires his interest in the land taken by the same tenure that parties to a partition proceeding acquire theirs, viz., by the judgment of a competent tribunal, having jurisdiction under statutory regulations, to prescribe and determine the rights and liabilities of the respective parties in the land to be affected. (*Mayor etc., v. Colgate*, 12 N. Y. 140, 148; *Child v. Chappell*, 9 id. 246, 255.) The contract created by the statute and proceedings referred to, applies to all persons entitled to be heard on the proceeding, and enures equally to the benefit of all, although they may be assessed unequally for its cost.

These differences in value are regulated by the awards of the commissioners, and are intended to be apportioned as equally as possible among the respective abutters and individuals benefited by the improvement, according to the value of the property taken, and the benefits which they are supposed to derive from the street.

The claim made that the owner of property taken for a street obtains, through the award of the commissioners, full compensation for his property is unfounded, unless the bene-

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fits for which he is assessed, are inviolably secured to him by such proceedings. Any other construction of the statute would render it an efficient engine of fraud and injustice.

An abutting owner necessarily enjoys certain advantages from the existence of an open street adjoining his property, which belong to him by reason of its location, and are not enjoyed by the general public, such as the right of free access to his premises, and the free admission and circulation of light and air to, and through his property. These rights are not only valuable to him for sanitary purposes, but are indispensable to the proper and beneficial enjoyment of his property, and are legitimate subjects of estimate by the public authorities, in raising the fund necessary to defray the cost of constructing the street. He is therefore compelled to pay for them at their full value, and if in the next instant they may by legislative authority be taken away and diverted to inconsistent uses, a system has been inaugurated which resembles more nearly legalized robbery than any other form of acquiring property.

Although it may be assumed that the municipality by proceedings, to open a street, acquires the fee to the land taken, it is yet a qualified fee, held in trust under the statute for a certain use, and that use cannot be departed from without violating an essential condition of the contract under which the land was obtained. (Cooley, *supra*.)

The right which the municipality acquires, is limited by the public necessity, and in this case cannot extend beyond its use for street purposes, and all other uses which might be enjoyed therein, consistent with its use as a street, must from necessity have remained in, and resided with the person from whom it was taken, even after the transfer of the fee to the municipality. (*In the Matter of Albany St.*, 11 Wend. 150; *In the Matter of Cherry St.*, 19 id. 659; *Hooker v. Utica and Minden Turnpike Road Co.*, 12 id. 371; *Heyward v. Mayor, etc.*, 7 N. Y. 314.)

Even if this were not so, the covenant implied from the language of the statute, and the proceedings taken thereunder,

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was made with and intended for the benefit, among others, of abutting owners, and is a covenant which runs with the land and inures to the advantage of each successive grantee as he succeeds to the title.

Covenants in conveyances, to the effect that adjoining lands shall be forever used in such manner, as not to interfere with the free passage of light and air to the premises conveyed, are effectual to create an easement over the lands retained, for the benefit of the lands conveyed, and so it has been frequently held. (*Whites's Bk. of Buffalo v. Nichols*, 64 N. Y. 65, 75, and cases cited.) This easement constitutes property, of which its owner cannot lawfully be deprived without receiving compensation therefor, and it was so held in the *Story Case*.

The act of the legislature under which the defendant was organized, and from which its authority to take the property in question is claimed, if held to authorize an interference therewith without making compensation, is plainly obnoxious to the objection that it sanctions the taking of private property for public use, and is also in conflict with that provision of the Federal Constitution prohibiting State legislatures from passing laws impairing the obligation of contracts.

The logical effect of the decision in the *Story Case* is to so construe the Constitution, as to operate as a restriction upon the legislative power over the public streets opened under the act of 1813, and confine its exercise to such legislation, as shall authorize their use for street purposes alone. Whenever any other use is attempted to be authorized, it exceeds its constitutional authority. Statutes relating to public streets which attempt to authorize their use for additional street uses, are obviously within the power of the legislature to enact, but questions arising under such legislation are inapplicable to the questions here involved.

Such are the cases in respect to changes of grade; the use of a street for a surface horse railroad; the laying of sewers, gas and water pipes beneath the soil; the erection of street lamps and hitching posts, and of poles for electric lights used

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for street lighting. All of these relate to street uses sanctioned as such by their obvious purpose, and long continued usage, and authorized by the appropriation of land for a public street.

We also deem it unnecessary to consider those cases defining the rights of municipal corporations in lands whereof they have obtained an absolute fee, by purchase or otherwise, for no such case is here presented, and they are in no sense analogous to the questions under consideration. (*Heyward v. Mayor, etc.*, 7 N. Y. 314; *Rexford v. Knight*, 11 N. Y. 308; *De Vorague v. Fox*, 2 Bl. C. C. 95.) Neither do cases apply here which refer to the continued control retained by legislature, ver grants by the State of public privileges to individuals or corporations, for these are generally conferred subject to the power of revocation and modification by the legislature whenever the public interests require it, and their power over them is attributable to the reserved rights of the State in the subject of the grant. (*East Hartford v. Hartford Bridge Co.*, 10 How. [U. S.] 511, 536.) It may also be proper to observe, without intending to discuss the case upon that theory, that it is difficult to see why this action is not maintainable within the principle recently decided by this court in *Cogswell v. New York, New Haven & Hartford Railroad Company* (103 N. Y. 10). Certainly that case is a conclusive authority upon the question of what constitutes a taking of property within the meaning of the Constitution, and of the liability of the perpetrator of such injuries, for the damages occasioned by a corruption of the air, through the dissemination therein of noxious and unwholesome elements, such as gas, smoke, dust, cinders, ashes, etc., to the detriment of the property of adjoining owners.

No question arises in this case as to the proper rule to be laid down for the assessment of the abutter's damages as the parties have agreed upon the rule to be adopted, and have made that, the law of the case.

This action was brought upon the theory that the building of defendant's railroad, and its operation, constituted a

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permanent appropriation of the street for railroad purposes, inconsistent with its use for street purposes, and entitled the plaintiff to recover in a single action all of the damages occasioned to his property by such taking. The case was tried upon this theory, and the defendant admitted the permanency of the intended use, and acquiesced in the rule of damages adopted by the trial court.

Among the requests to charge made by it, was that, "the plaintiff can only recover such amount as has been proved to be the permanent loss in the value of his property by reason of the taking by defendant of so much of the easements of light, air and access as has been proved to have been taken by it."

The court followed this request and charged that "the question is simply how much has he (the plaintiff) lost by the taking away of his light and air, and for that you can give him compensation and you can add interest to the amount if you think fit to do so."

The charge of the court was not excepted to by the defendant, and its request, followed by its adoption by the court, constituted a waiver of any previous exception (if any there was) conflicting with the rule laid down.

The rule of damages having been thus agreed upon, the case was taken out of the operation of the *Uline Case* (*Uline v. N. Y. C. & H. R. R. R. Co.*, 101 N. Y. 98), recently decided in this court. The rule adopted assumes that the cause of action arose when the railroad was built and put in operation, and that the liability of the wrong-doer for the entire damage then became ascertainable, certain and absolute.

The circumstance that at some time thereafter, the operation of the railroad, was assumed and carried on by a lessee or grantee of the original wrong-doer, was entirely immaterial on the question of defendant's liability, and the evidence of its subsequent operation, was important only as bearing upon the character of the use and the nature of the wrongs inflicted.

But a single question of any importance remains to be discussed, and that refers to the claim made, that the defendant

is not liable for the operation of its trains, and the consequences flowing therefrom, in respect to the manufacture and distribution in the air of gas, smoke, steam, dust, cinders, ashes and other unwholesome and deleterious substances from its locomotives and trains, as they move to and fro over its tracks.

We have been unable to see any reason why the defendant should not be liable for the injury thus occasioned, provided the evidence established the fact that they were destructive of the easements of light, air and access belonging to the plaintiff.

It follows necessarily from the proposition that a permanent structure erected in a street, interrupting to any considerable extent the passage of light and air to adjacent premises, works the destruction of easements for such purposes; that any incident of the structure which necessarily increases and aggravates the injury must be subject to the same rule of damage.

No partial justification of the damages inflicted by an unlawful structure, and its unlawful use, can be predicated upon the circumstance, that under other conditions and through a lawful exercise of authority, some of the consequences complained of, might have been produced without rendering their perpetrator liable for damages.

The structure here, and its intended use, cannot be separated and dissected, and it must be regarded in its entirety in considering the effect which it produces upon the property of the abutter. However the damage may be inflicted, provided it be effected by an unlawful use of the street, it constitutes a trespass rendering the wrong-doer liable for the consequences of his acts.

The legislature, as we have seen, had no power to authorize the street to be used for an elevated steam railroad, and that want of authority extends to every incident necessary to make the road an operative elevated steam railroad, which occasions injury to the rights of abutters on the street. (*Balt. & Pct. R. R. Co. v. Fifth Bap. Ch.*, 108 U. S. 317, 329.)

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We have carefully examined the other exceptions taken by the appellants in the course of the trial and all seem to us to be covered, either by the decision in the *Story Case* or the discussion already had.

We have been made aware that many questions involved in actions by abutters, against the defendant have been agitated in other cases, which it is stated are now on the way to this court, and may hereafter require consideration here.

In discussing this case, we have refrained from referring to any of those questions, unless properly raised by sufficient exceptions, and, necessarily involved in the determination of this case, leaving the consideration of other questions for the cases where they properly arise.

The judgment should be affirmed.

ANDREWS and DANFORTH, J. J., concur. RAPALLO, J., took no part. EARL and FINCH, J. J., concur in result, handing down the following memorandum :

EARL and FINCH, JJ., not being able to concur in all the views expressed in the foregoing opinion, concur in the result on the authority of the *Story Case* (90 N. Y. 122); deeming it necessary to add that, while they are unwilling to extend the scope of the decision in that case beyond its fair import, yet in their opinion it gives to abutting owners only damages for the construction and operation of the railway in front of their premises, resulting from the taking or destruction of their street easements of light, air and access, and for such damages to their adjoining property as are necessarily caused by such taking and destruction; that the abutters cannot recover damages to or upon their abutting property caused by the lawful operation of the road, and not by the deprivation or destruction of their easements in the street; that there can be no recovery for any thing done by the railway in the street except as it deprives, or tends to deprive, the abutters of the easements mentioned, and that they believe these principles were not violated upon the trial of this action.

Judgment affirmed.

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THE NATIONAL PARK BANK OF NEW YORK, Respondent, v.
JAMES D. WHITMORE et al., Appellants.

An agreement, made at the time of the purchase of goods on credit, between the vendor and purchaser, that in case of the insolvency of the latter, or of an assignment becoming necessary, he will protect the former by a preference to the amount of the goods sold and unpaid for, is not in law a fraud upon other creditors, nor is it so far conclusive evidence of fraud as to avoid a preferential assignment made in pursuance thereof.

The affidavits upon which an attachment was issued set forth the making of such an agreement by the defendants with W., another creditor. The following facts also appeared on motion to vacate the attachment. A few days before the assignment was made defendants reported that they were entirely solvent and could pay all their debts in full, and made a statement of their affairs showing a large surplus of assets over liabilities, soon after this claiming they could not pay their debts in full and were insolvent, they proposed to their creditors a compromise, and threatened, unless their offer was accepted, to make an assignment preferring W., stating that then the other creditors would get little or nothing. The assignment was made to a foreign assignee two days after the attachment was issued. The evidence tended to show that the assignors had been engaged in a prosperous business, and they gave no satisfactory or intelligible explanation of their sudden alleged insolvency. After the assignment was made defendants and the assignee co-operated apparently to coerce a compromise, and offered to "fix it up" with a creditor if he would consent thereto. *Held*, the facts justified a finding that the assignment was threatened and made by defendants, while not actually insolvent, to coerce a favorable compromise and thus secure a benefit to themselves; at least there was sufficient to give the court below jurisdiction to award the attachment, and its exercise was not reviewable here.

(Argued December 7, 1883; decided February 11, 1887.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department made June 1, 1886, which reversed an order of Special Term vacating an attachment issued herein. (Reported below, 40 Hun, 490.)

The material facts are stated in the opinion.

Edward W. Sheldon for appellants. The agreement by the defendants to prefer the Whiting Paper Company was
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lawful, and did not justify an attachment, on the ground that it furnished evidence that they were about to assign and dispose of their property with intent to defraud their creditors. (Code Civ. Proc. § 636; *Bk. of Leavenworth v. Hunt*, 11 Wall. 391; *Jordan v. Shoe and Leather Bk.*, 74 N. Y. 467, 473; *Clarke v. White*, 12 Pet. 178, 200; *Tompkins v. Wheeler*, 16 id. 106; *Spaulding v. Strang*, 37 N. Y. 135; *S. C.* 38 id. 1; *Haydock v. Coope*, 53 id. 68; *Low v. Graydon*, 50 Barb. 415; *Powers v. Graydon*, 10 Bosw. 630; Burrill on Assignments, 246, *Smith v. Craft*, 11 Biss. 310; *S. C.* 12 Fed. Rep. 856; *S. C.* 17 id. 705; *Grover v. Wakeman*, 11 Wend. 195; *Riggs v. Murray*, 2 Johns. Ch. 564; *Anderson v. Lachs*, 59 Miss. 111; *Walker v. Adair*, 1 Bond, U. S. Cir. Ct. 158.) The original affidavits of De Baun and McCarthy being, so far as material facts are concerned, made upon information and belief, should be ignored. (*Steuben Co. Bk. v. Alberger*, 78 N. Y. 252.) The intent to defraud by the disposition of the property must be a fair and logical sequence from the facts shown, and these facts must appear by affidavit. (*St. Armand v. De Beizcedon*, 2 Sandf. 703; *Elliston v. Bernstein*, 60 How. 145.) Neither the making of an assignment for the benefit of creditors nor a threat to make such an assignment, with or without preferences, is ground for the granting of an attachment. (*Millikin v. Dart*, 26 Hun, 24; *Thurber v. B'anc*, 50 N. Y. 80; *Anthony v. Wood*, 96 id. 180; *Smith v. Longmire*, 24 Hun, 257; *Castle v. Lewis*, 78 N. Y. 131; *McConnell v. Sherwood*, 58 How. Pr. 453; *Work v. Ellis*, 50 Barb. 512; *Wilson v. Britton*, 26 Barb. 562; *Anthony v. Stype*, 19 Hun, 265; *Evans v. Warner*, 21 id. 574; *Dickerson v. Benham*, 20 How. Pr. 189; *Farwell v. Brown*, 1 Fed. Rep. 128.) The evidence of the indebtedness of the defendants is not sufficiently alleged in the affidavits upon which the attachment was granted. (Code, § 636; *People v. Sutherland*, 81 N. Y. 1; *Ex parte Bk. of Monroe*, 7 Hill, 177; *Ex parte Shumway*, 4 Den. 258; *Payne v. Young*, 8 N. Y. 158; *Marine Nat. Bk. v. Ward*, 35 Hun, 399; *Gribbon v. Back*, id. 541; *Cribben v. Schillinger*, 30 id.

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248.) The non-residence of one of the defendant partners, as alleged in the affidavit on which the attachment was granted, affords no justification for the attachment. (*McKinlay v. Fowler*, 67 How. 388.) The non-residence of the assignee is not proof of a fraudulent intent in making an assignment. (*Blackington v. Goldsmith*, 3 How. Pr. [N. S.] 77.) The right to an attachment having been conferred by statute, is limited to a strict compliance with the provisions of the statute. (*Blossom v. Estes*, 22 Hun, 472; *Drake on Attachments*, §§ 85, 86.) Where the evidence is capable of an interpretation which makes it as consistent with an innocent as with a fraudulent intent, that meaning must be ascribed to it which accords with innocence. (*Morris v. Talcott*, 96 N. Y. 100; *Stringfield v. Fields*, 7 Civ. Proc. Rep. 360.)

Charles W. Wetmore for respondent. An agreement between a debtor and one of his creditors that if the creditor will loan money, he will in case of his insolvency prefer such creditor, is in the nature of a secret lien, which is a fraud on the creditors, who subsequently deal with the debtor without any knowledge thereof, and which will render as to them a subsequent transfer of all the debtor's property in accordance with such agreement void. (*Smith v. Craft*, 2 Biss. 340, 345, 348.) A promise, upon sufficient consideration, to indemnify or to secure another, by the giving of the lien by way of chattel mortgage or otherwise upon property, left in the possession of the promisor, creates an equitable lien upon such property, valid as against the promisor, and enforceable against the property, in the hands of an assignee for the benefit of the creditors of the promisor. (*Hale v. Omaha Nat. B'k*, 49 N. Y. 626, 633; *Story Eq. Jur.* § 717; *Husted v. Ingraham*, 75 N. Y. 251, 257, 258; *Arnold v. Morris*, 7 Daly, 498, 503-506; *Chase v. Peck*, 21 N. Y. 581; *Robinson v. Williams*, 22 id. 380; *Payne v. Wilson*, 74 id. 348.) A chattel mortgage, or an agreement to give a chattel mortgage, or any other form of lien or right to the property of the mortgagor or promisor, which contem-

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plates, either by express provision in the instrument or by necessary implication from its terms, or by agreement or understanding, written or verbal, outside the instrument, that the mortgagor or promisor, besides retaining possession of the property, may deal with it in all respects as his own, is fraudulent in law against the other creditors of the mortgagor or promisor. (*Wood v. Lowry*, 17 Wend. 492, 494, 495; *Edgell v. Hart*, 9 N. Y. 213, 216, 217; *Southard v. Pinckney*, 5 Abb. [N. C.] 194, 196, 197; *Potts v. Hart*, 99 N. Y. 163, 172, 173; *Fowler v. Haynes*, 91 id. 346.) It cannot be material what the secret intention or animus in the minds of Whiting and the defendants was. They must be presumed to have intended the natural and inevitable consequences of their own agreement and acts. (*Coleman v. Burr*, 93 N. Y. 17, 31; *Potts v. Hart*, *supra*.) A provision in the assignment itself, that the assignee may compromise with the creditors, upon such terms as he may deem to the advantage of the creditors and assignor, or the giving of a preference, conditional upon the creditors to be preferred, releasing the unpaid residue of their debts, or an actual intent to accomplish similar ends, proved by evidence independent of the instrument, render an assignment fraudulent and void. (*Work v. Ellis*, 50 Barb. 512, 573; *McConnell v. Sherwood*, 58 How. Pr. 453, 460, 461; *S. C.*, 84 N. Y. 522, 530; *Hyslop v. Clark*, 14 Johns. 458; *Grover v. Wakeman*, 11 Wend. 187; *Gasherie v. Apple*, 14 Abb. 68; *Livermore v. Rhodes*, 27 How. 506; *Anthony v. Stype*, 19 Hun. 265.) In England, agreements to give security for advances made, when the actual execution of the instrument affecting the security is to be postponed until the lender has lost confidence in the debtor, or until the debtor becomes insolvent, are fraudulent as against creditors. (*Ex parte Fisher*, 7 L. R. [Ch. App. Cas.] 636, 644; *In re Gibson*, 8 L. R. [Ch. Div.] 230; *Ex parte Kilner*, 13 id. 245, 247, 248; *Ex parte Burton*, id. 102, 108.) Here the obligation to be secured was incurred with the understanding that it should not be made known until the necessities of the debtors' condition

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should so require for the protection of the creditor. (*Hilliard v. Cagle*, 46 Miss. 309, 337, 345.) Inference of fraudulent intent can be drawn from threats to make a preferential assignment, if sued, or if an offered compromise is rejected. (*White v. Leszynsky*, 14 Cal. 165, 167; *Newman v. Krain*, 34 La. [Ann.] 910; *Curry v. Hart*, 2 Sandf. Ch. 353, 417; *Cram v. Mitchell*, 1 id. 251; *Anderson v. Sachs*, 59 Miss. 111.)

W. W. Macfarland for William Whiting, assignee, etc. Neither the promise to prefer nor the assignment of the defendants was evidence of an intention to assign and dispose of property fraudulently and with a view to hinder, delay and defraud creditors. (*Candee v. Lord*, 2 Comst. 269; *Bronson v. R. R. Co.*, 2 Black. 524; *Underwood v. Lachs*, 59 Miss. 111; *Spaulding v. Strang*, 38 N. Y. 1.) The question raised and decided below cannot be raised on a motion to vacate an attachment. (*Thurber v. Blank*, 50 N. Y. 80; *Anthony v. Wood*, 96 id. 180; Bishop on Assignments, 245; *Casler v. Shipman*, 35 N. Y. 533.) The affidavits on which the warrant of attachment was granted were wanting in both the quality and quantity of proof required by law. (*Ex parte Haines*, 18 Wend. 611; *Hall v. Bond*, 27 How. Pr. 272; *Ackroyd v. Ackroyd*, 11 Abb. Pr. 342; *Brewer v. Tucker*, 13 id. 76; *Willard v. Denton*, 17 How. Pr. 480; *Genin v. Tompkins*, 12 Barb. 273; *Fitzgerald v. Belden*, 49 How. 225; *In re Bliss*, 7 Hill, 187; *In re Faulkner*, 4 id. 598; *Morris v. Talcott*, 96 N. Y. 107; *Stringfield v. Fields*, 7 N. Y. Civ. Pro. R. 360; 3 Greenl. Ev., §§ 381, 385.) Facts must be stated necessarily leading to the presumption of fraudulent intent. (*Morris v. Talcott*, 96 N. Y. 104, 107.) The facts must necessarily tend to establish an intent of guilt. (*Stringfield v. Fields*, *supra*.) The right to a warrant of attachment rests solely on statute and being in derogation of the common law, every statutory condition must be shown to exist in order to confer jurisdiction or authorize the exercise of judicial discretion. (*Drake on Attachments*, §§ 106, 107; *Blossom v. Estes*, 84 N. Y. 614; *Startwell v. Field*, 68 id. 341; *Hall v. Bond*, 22 How. 272; *Shultz*

v. *Hoagland*, 85 N. Y. 463; *Steuben County Bank v. Alberger*, 78 id. 258; *Wilson v. Britton*, 26 Barb. 562; *Livermore v. Northup*, 44 N. Y. 109; *Ogden v. Peters*, 21 id. 23.)

EARL, J. This attachment was granted on the 31st day of December, 1885, on the ground that the defendants were about to assign their property with intent to defraud the plaintiff and their other creditors. On the 2d day of January thereafter, the defendants executed to William Whiting, of Holyoke, Mass., a general assignment for the benefit of their creditors, in which they preferred him for upwards of \$23,000. Upon motion made by the defendants at Special Term, the attachment was vacated, as appears by the opinion there pronounced, upon the ground that the affidavits upon which the attachment was based did not sufficiently establish the fraudulent intent alleged. From the decision of the Special Term, the plaintiff appealed to the General Term, and there the order of the Special Term was reversed, as appears by the opinion pronounced, on the ground that the defendants had agreed with Whiting, at the time of the sale of certain goods to them, that in case of their insolvency or of an assignment becoming necessary he should be protected by a preference to the amount of the goods so sold to them and unpaid for. It was held that such an agreement was in law a fraud upon other creditors and rendered an assignment giving a preference in pursuance thereof fraudulent and void. From the order of the General Term the defendants have brought this appeal.

We have frequently held that we cannot look at the opinion pronounced below in a case like this for the grounds upon which the decision proceeded, and hence if we find in this record any ground upon which the General Term could, in the exercise of its jurisdiction, have reversed the order of the Special Term and thus sustained the attachment, its order must be affirmed although we do not agree with its opinion.

We do not think that the promise of the defendants to make a preferential assignment in favor of Whiting was in

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law a fraud upon other creditors or that it was so far conclusive evidence of fraud as to avoid the assignment made in pursuance thereof.

The property which the defendants obtained by their agreement with Whiting added to their visible assets, and all their assets remained liable to the legal remedies of their creditors until the assignment was made. By adding \$23,000 to their assets by goods thus obtained of Whiting, and then preferring him for the same amount in their assignment, no harm was done to or fraud committed upon their other creditors.

It is said, however, that this sale under a secret promise of a future preference gave the defendants a delusive appearance of prosperity and solvency, and thus enabled them to obtain credit which they otherwise could not have obtained, and that thus the agreement necessarily operated as a fraud upon other creditors. But it cannot be maintained that an agreement is fraudulent which simply adds to a debtor's assets, gives him the appearance of solvency which he does not in fact possess, enables him to obtain credit and continue his business, and thus postpones impending failure. A debtor may obtain credit by a promise to pay in the future, either in cash or in property, or by promising to give his check or an indorsed note, or a confession of judgment. Neither such a promise, nor its performance, is a legal fraud upon any one; and why may he not promise to give security upon the property purchased, or other property? Such a promise, honest in fact, has never been held to be a fraud or to work a fraud upon creditors. Security, honestly given in pursuance of such a promise, relates back to the date of the promise, and, except as to intervening rights, is just as good and effectual as if given at the date of the promise; and it has generally been so held, even in bankruptcy proceedings. (*Bump's Bankruptcy* [10th ed.], 821; *Forbes v. Howe*, 102 Mass. 427; *Bank of Leavenworth v. Hunt*, 11 Wallace, 391; *Burdick v. Jackson*, 7 Hun, 488; *Ex parte Ames*, 1 Lowell's Dec. 561; *Ex parte Fisher*, 7 Ch. App. Cas. L. R. 636; *Ex parte Külner*, 13 L. R. Ch. Div. 245; *Mercer v. Peterson*, 2 Ex. L. R. 304; S. C. 3 id. 104.)

But here the agreement was to make the preferential assignment in case it became necessary to protect the creditor; and it is further claimed that such a conditional agreement is a fraud upon other creditors. A failing debtor may make an assignment preferring one or more creditors because he is under a legal, equitable or moral obligation to do so, or he may do it from mere caprice or fancy, and the law will uphold such an assignment honestly made. If he may make such an assignment without any antecedent promise, why may he not make it after and in pursuance of such a promise? How can an act otherwise legal be invalidated because made in pursuance of a valid or invalid agreement honestly made? In *Smith v. Croft* (11 Bissell, 340), Judge GRESHAM held that such a conditional agreement for a future preference was a fraud upon creditors. But in the same case (17 Fed. Rep. 705), upon a rehearing, Judge WOODS held that the same agreement was not fraudulent, and in a very satisfactory opinion showed that such an agreement, as we have here, for a future preference in case of insolvency is not a legal fraud upon creditors. (See, also, *Walker v. Adair*, 1 Bond [U. S. Cir. Ct.], 158; *Anderson v. Lachs*, 59 Miss. 111; *Spaulding v. Strang*, 37 N. Y. 135; *S. C.* 33 N. Y. 1; *Haydock v. Coope*, 53 N. Y. 68.)

This agreement did not create any lien, legal or equitable, upon the property of the defendants. It was not an agreement for a future lien upon the specific property, which is sometimes held to create an equitable lien which may be enforced in equity. It was not an agreement for any lien at all. It was simply an agreement, in case of an assignment by the defendants, to prefer Whiting. The agreement did not bind defendants' property, nor encumber it, but left it subject to all the remedies of their creditors, and it neither hindered nor delayed those creditors. They could have made the same assignment without a previous agreement and it is impossible to perceive how the agreement worked any legal harm to any one.

It is not important to determine whether this was an agreement of which a court of equity would enforce specific

performance, but we do not believe it was, and think it must stand both in law and equity like an agreement to pay at a future day.

But we think there were sufficient facts set forth in the affidavits to give the court jurisdiction to determine whether or not the defendants in threatening to make, and in making the assignment, were actuated by a fraudulent intent. A few days before the assignment was made the defendants reported that they were entirely solvent and could pay all their debts in full, and they made a statement of their affairs showing a large surplus of assets over liabilities. Soon after these representations. they claimed that they could not pay their debts in full and that they were insolvent, and proposed to their creditors a compromise of fifty cents on the dollar, payable in nine, twelve and fifteen months without security. The evidence tended to show that they had been engaged in a prosperous business yielding them large profits, and they gave no satisfactory or intelligible explanation of their sudden alleged insolvency. They threatened that unless their offer of compromise was accepted they would make an assignment preferring Whiting and that then the rest of their creditors would get little or nothing. The efforts of the defendants, with the co-operation of their assignee after the assignment, apparently to coerce a compromise at twenty-five cents on the dollar, their offer "to fix it up" with a creditor afterward if he would assent to the compromise, their selection of a foreign assignee, the relations between him and them, and the secret promise of a future preference are also pertinent facts.

The court at General Term, looking at no one fact, but at all the facts before and after the assignment, could, we think, find that the assignment was threatened and made by the assignors, not solely for the honest purpose of devoting their assets to the payment of their just debts, but, while not actually insolvent, to coerce a favorable compromise from their creditors and thus secure a benefit to themselves.

The proof of the fraudulent intent alleged may not have been very cogent, but it was sufficient to give the court below

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jurisdiction to award the attachment, and hence we are bound by its decision and have no jurisdiction to interfere therewith.

The appeal should therefore be dismissed with costs.

All concur.

Appeal dismissed.

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In the Matter of the Application to compel payment by the Executors and Legatees of and under the last Will and Testament of MARY MCPHERSON, deceased, of the tax imposed by Chapter 483, Laws of 1885.

A tax, such as is provided for by the act of 1885 (Chap. 483, Laws of 1885), 'to tax gifts, legacies and collateral inheritances in certain cases,' may be constitutionally imposed.

Said act is not violative of the provision of the State Constitution (Art. 3, § 20), which provides that every law imposing a tax "shall distinctly state the tax and the object to which it is to be applied." Said provision was intended to apply to the annual recurring taxes known at the time of the adoption of the Constitution and imposed generally on the entire property of the State; it does not apply to a special tax like that provided for in said act.

The said act provides sufficiently for a notice and hearing, or opportunity to be heard, and so does not invade the constitutional right to "due process of law." (Art. 1, § 6.)

The said act confers no powers upon Surrogates' Courts prohibited by the Constitution; the imposition and collection of the tax, as provided in the act, is simply an incident in the settlement of the estate of a deceased person, and is not so foreign to the jurisdiction generally exercised by said courts as to make the act obnoxious to any constitutional objection.

The fact that the act may not have operation as intended by the legislature in some cases does not affect its validity in the cases where it may operate without difficulty or embarrassment.

(Argued January 17, 1887; decided February 1, 1887.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made September 24, 1886, which affirmed a decree of the surrogate of Albany county, ordering and

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directing the payment by the executors and legatees under the will of Mary McPherson, of a tax upon their respective legacies imposed under and pursuant to the act chapter 483, Laws of 1885.

The will of the testatrix, aside from legacies to various charitable institutions, gave legacies amounting to \$28,000 to various persons, none of whom stood in any relationship to her specified in said act. The residue of her estate she gave to her executors in trust, to erect a monument to the memory of Robert Burns in Washington Park in the city of Albany.

John F. Montignani and *Robert G. Scherer* for appellants. As a special or specific tax, imposed upon the passing of property, the act is invalid. (*Gordon v. Cornes*, 47 N. Y. 611; *Wynehamer v. People*, 3 Kern. 404; 1 *Desty on Tax*, 4, § 18, p. 53; *People v. Comm.* 76 N. Y. 71; *Cooley on Const. Lim.* [5th ed.] 613; *Stuart v. Palmer*, 74 N. Y. 189, 190; *Pleuber v. State*, 10 N. W. Rep. 485; *People v. Fire Asso.*, 92 N. Y. 323; *In re Mayor, etc.*, 11 Johns. 77; *Sharp v. Speir*, 4 Hill, 82.) The right of bequest or testamentary disposition is a purely natural and essential right, indispensable to the common ordinary right of private property, "the guarantee to individuals of the fruits of their own labor and abstinence." (Mill's *Prin. of Pol. Econ.*, chap. 2, Property, 278, § 1; id. 281, § 4; *Essays on Prop. & L.* part 3, p. 78; *Remsen v. Brinkerhoff*, 26 Wend. 332; *Windham v. Chetwynd*, 1 Bur. 414; *Stewart's Ex'r v. Lispenard*, 26 Wend. 296; *Lewis v. Jones*, 50 Barb. 672.) The right of inheritance is a natural, absolute right, and as such not specially taxable. (1 T. D. Woolsey [Pol. Science], § 48.) Chapter 483, as imposing a special tax on the devolution of property, is void, and that it must be considered as a general tax. (2 *Locke on Civ. Gov.*, 124, 134, 135.) The whole act is therefore unconstitutional. (*People v. Sup'rs. of Westchester*, 4 Barb. 64, 70; *White v. White*, 5 id. 484, 485; *Taylor v. Porter*, 4 Hill 144, 145; *Sweet v. Hulbert*, 51 Barb. 312; *Clark v. City of Rochester*, 13 How. Pr. 206; *Colde v. Bruce*,

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3 Dallas, 386; *Wynehamer v. People*, 3 Kern. 404; *Rockwell v. Nearing*, 35 N. Y. 302; *Stewart v. Palmer*, 74 id. 188.) The act is invalid as a general law, imposing, an arbitrary tax, not equal or uniform, and which unjustly discriminates between citizens. (Cooley on Const. Lim., 169, 170, 393, 479; *Lexington v. McMillan's Heirs*, 9 Dan. 513-516; *Youngblood v. Sexton*, 32 Mich. 406; *People v. Supr's*, 20 Barb. 81-88; *S. C.*, 16 N. Y. 424, 439; *People v. Com'rs*, 76 id. 71; *Stuart v. Palmer*, 74 id. 190; *Flatbush Lands*, 60 id. 406, 407; U. S. Const. Am. 14; *In re Van Antwerp*, 56 N. Y. 265; Cooley on Tax'n [2d. ed.], 47; *Hervill v. Buffalo*, 37 N. Y. 270; *People v. Mayor, etc.*, 4 id. 419.) The constitutional validity of the law is to be tested, not by what has been done under it, but by what may, under its authority be done. (*Stuart v. Palmer*, 74 N. Y. 188.) As to the purpose of a tax, the power of the legislature is limited and can be reviewed. (*Weismer v. Village of Douglas*, 64 N. Y. 97.) The method providing for assessing and collecting the tax may also be examined into, and if not found just, the law be declared void. (*Stuart v. Palmer*, 74 N. Y. 183; *People v. Eq. T. Co.*, 96 id. 395-396.) The probable effect of a tax law may be considered by the courts, and if deemed arbitrary and oppressive on an individual, citizen or class of citizens, the law be pronounced invalid. (*In re Flatbush*, 60 N. Y. 407; *Gordon v. Cornes*, 47 id. 611, 612; *People ex rel. M. F. I. Co v. Com'rs*, 76 id. 71.) There are exempt from the legislative power of special taxation (1.) rights expressly protected by the Constitution; (2.) rights by necessary implication so protected; (3.) such natural rights as are reserved to the people themselves and not by the Constitution intrusted as subjects of legislation to the legislature. (Cooley's Const. Lim. 207 [175*]; *Wilkinson v. Leland*, 2 Pet. 627-657; *Taylor v. Porter*, 4 Hill, 144, 145; *Calder v. Bruce*, 3 Dall. 386.) Uniformity and equality are essential to a valid tax. (*In re McMahon v. Palmer*, 102 N. Y. 188, 189.) Considered as a tax on property the law is invalid as not providing for a legal apportionment. (Laws of 1885, chap. 483, §§ 6, 9, 23;

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Stuart v. Palmer, 74 N. Y. 183; *People v. Eq. T. Co.*, 96 id. 396.) Chapter 483, Laws of 1885, is void as being a law which imposes a tax and does not distinctly state the object to which that tax is to be applied. (Const. N. Y., art. 3, § 20; *Sun Mut. Ins. Co. v. Mayor, etc.*, 8 N. Y. 241; *People v. Sup'rs of O.*, 27 Barb. 575; 17 N. Y. 235; *Blk R. B'k. v. Sup'rs Jeff'n*, 27 Barb. 583, n.; Const. of 1847, art. 7, § 3; 27 Barb. 584, n.; *People v. Sup'rs Kings*, 52 N. Y. 556, 557, 559; *People v. Home Ins. Co.*, 92 id. 329; *People v. F. Ins. Co. Phil.*, id. 327; Cooley's Const. Lim. 116; *Weisner v. Village of Douglas*, 64 N. Y. 98.) The law is unconstitutional in that it confers upon the surrogate powers and duties not authorized by, but contrary to, the Constitution. (Const. art. 6 §§ 15, 16, 25, 27; Const. art. 14, §§ 8, 12; *Landers v. Stat. Isl. R. R. Co.*, 53 N. Y. 450; *People v. Porter*, 90 id. 71; *People v. Gardner*, 45 id. 812; *People v. Green*, 58 id. 303; *Delany v. Brett*, 51 id. 78; *Wilkins v. Earl*, 46 id. 358; *People ex rel. Lent v. Carr*, 100 id. 236, 242; Cooley Const. Lim. 177 [5th ed.], p. 211.)

Leonard G Hun and Eugene Burlingame for appellants. The constitutional validity of a law is to be tested, not by what has been done under it, but by what may, by its authority, be done. (*Stuart v. Palmer*, 74 N. Y. 183.) Where parts only of an act are found to be unconstitutional, but such parts are essential to the existence of the constitutional parts, or are so related to them as to make it evident that the legislature intended them to constitute one whole, so that if all could not be carried into effect no parts thereof would have been enacted by it, the whole act should be declared void. (Bishop on Stat. Cr. [2d ed.] § 34; Cooley on Const. Lim. [5th ed.] 213.) The act of 1885 (Chap. 483), fails to prescribe with that certainty and precision which is essential to the validity of all laws imposing taxes, rules for apportioning determining and collecting the taxes to be imposed upon the various estates and interests specified therein. (Cooley on Tax'n.

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[2d ed.] 237, 243, 244; *People v. Brooklyn*, 4 N. Y. 419, 426, 427; *State v. Com'rs*, 73 Ala. 65, 70; Williams on Ex'rs. [6 Am. ed.], 1696.) Where a future estate or interest in the property of a decedent is given by his will to any person, not absolutely, but only in case he shall be living at a certain time, or at the expiration of a prior estate, or upon the happening of some other uncertain event, the occurrence or non-occurrence of which is dependent upon the will of another person, the estate or interest so acquired by him is not, prior to the happening of the event, upon the occurrence of which the vesting of his title to the estate or interest is dependent, "property" having a "market value;" nor can the legislature impose upon it a tax to be collected from other property of such person not forming part of the decedent's estate, under a judgment to be entered against such person in proceedings instituted to recover the amount of this tax. (*Weismer v. Village of Douglas*, 64 N. Y. 91; *Bertholf v. O'Reilly*, 74 id. 509-515; *In re Deansville Cemety*, 66 id. 569-572; *In re Townsend*, 39 id. 71-174; *In re Jacobs*, 98 id. 110, 111; *Duell v. Alvord*, 41 Hun, 196; *Potter v. Com'rs*, 10 Exch. 146-155; *Linimer Asphalte v. Com'rs*, 7 id. 211; *Hopkins v. Folger*, 60 Me. 266, 269; Sedg. on Dam. [7th ed.] 134, note a.; Suth. on Dam. 126; 3 id. 154, 155; Mayne on Dam. [Wood's ed.] 87; *Hoey v. Telton*, 11 C. B. [N. S.] 142; *Taylor v. Bradley*, 4 Abb. Ct. App. Dec., 366; *Wakemay v. W. & W. Mfg Co.*, 101 N. Y. 205.) The rule established by the act for determining the value for the purposes of taxation of future and contingent estates, whether arising by way of remainder, limitation or appointment, is unjust, oppressive and unconstitutional. (Cooley on Const. Lim. [5th ed.] 612, 613, 622; Cooley on Tax. [2d ed.] 237, 352, 493-513; *People v. Salem*, 20 Mich. 452-472; *State ex rel. v. Rondout*, 36 N. J. L. 66-70; *Lexington v. McQuillin's Heirs*, 9 Dana [Ky.], 513, 517; *Woodbridge v. Detroit*, 8 Mich. 274, 301; *Stuart v. Palmer*, 74 N. Y. 188, 189, 190; *People v. Dry Dock Co.*, 11 Abb. [N. C.] 40; *S. C.*, 92 N. Y. 487; *Gordon v. Cornes*, 47 N. Y. 608, 612; *People v. Eq. T. Co.*, 96 id.

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387; *In re Jacobs*, 98 id. 98, 111, 256, 257; *Portland Bank v. Apthorp*, 12 Mass. 252; *Com'rs. v. People's Sav. Bk.*, 5 Allen, 428, 431; *Com'rs. v. Ham. Mf'g. Co.*, 12 id. 298, 301; *Bank v. Hines*, 3 O. St. 1, 15; *Att'y Gen. v. Winn. Lake Co.*, 11 Wis. 35.) The legislature intended by this act to impose a tax on "property," the amount of which tax is to be determined by the "clear market value" of such property. (*Eyre v. Jacob*, 14 Gratt. 422, 428, 429, 436; *Tyson v. State*, 28 Md. 577; *Strode v. Com'rs*, 52 Penn. 183; *U. S. v. Allen*, 9 Ben. 154; *People v. Eq. T. Co.*, 96 N. Y. 387; Cooley on Tax. [2d ed.] 430.) The act violates the provisions of section 6 of article 1 of the Constitution, providing that no man shall be deprived of life, liberty or property without due process of law, in that it does not require that notice shall be given to the persons upon whom the taxes are to be imposed of the appraisement of their property, or the fixing and determining of the value of their estates or interests therein, or afford them a reasonable opportunity to be heard. (Cooley on Const. Lim. [5th ed.] 496, note 2; Cooley on Tax. [2d ed.] 51, 361, 366; *Stuart v. Palmer*, 74 N. Y. 183, 188; *Ireland v. Rochester*, 51 Barb. 414, 430, 431; *Blazier v. Miller*, 10 Hun, 437; *Railroad Tax Case v. Sawyer*, 8 Sawyer, 238; *Davidson v. N. Orleans*, 96 U. S. 97; *Hagar v. Rec. Distillery No. 108*, 111 id. 701, 709-711; *Stinger v. Com'rs*, 26 Penn. 422.) The restrictions imposed by section 20 of article 3 of the Constitution upon the power of the legislature to levy taxes were intended to benefit and protect the taxpayers of the State, and it is the duty of the court to so construe and enforce them as that their rights and interests may be fully cared for and preserved. (*People ex rel. Hopkins v. Sup'rs. of Kings*, 52 N. Y. 556, 566; *Sharp v. Speir*, 4 Hill, 76; *Newell v. Wheeler*, 48 N. Y. 486; *Bloodgood v. M. & H. R. R. Co.*, 18 Wend. 9-53.) The construction demanded by the terms of the Constitution should be adopted by the courts, regardless of the consequences. (*Bloodgood v. M. & H. R. R. Co.*, 18 Wend. 9-52; *People v. Morrell*, 21 id. 563-584; *Newell v. People*, 7 N. Y. 9-109; *Settle v. Van Evrea*, 49 id.

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280, 281.) The act violates section 20 of article 3 of the Constitution, which requires that every law which imposes, continues or revives a tax shall be so framed as that the courts and taxpayers can ascertain both the amount of the tax and the object to which it is to be applied, from a simple inspection of the act itself, without being compelled to resort to any other law. (Deb. Const. Conv., Cross. & Sutt. 727; *People ex rel. Hopkins v. Sup'rs of Kings*, 52 N. Y. 556-566; *Blk R. Bk. v. Sup'rs Jeff. Co.*, 27 Barb. 583; *People v. Sup'rs Orange Co.*, id. 575; *People v. Home Ins. Co.*, 92 N. Y. 328.) The statement that the taxes imposed by the act shall be "paid to the treasurer of the proper county, and in the city and county of New York to the comptroller thereof for the use of the State" (Laws of 1885, chap. 483, § 1), is not a sufficient statement of the object to which the tax is to be applied to satisfy the requirements of the Constitution. (*People v. Sup'rs of Chen. Co.*, 4 Seld. 317; *Darlington v. Mayor, etc.*, 31 N. Y. 186.)

Albert G. McDonald for appellants. The charge created by the act of 1885 (Chap. 483), is a tax such as comes within the constitutional provision, section 20, article 3. (1 Abb. L. Dict. 409; 1 Burrill's L. Dict. 407; Cooley on Tax. 3, 5; Bigelow's Life of Franklin, 479, 481, 504; *Westinghausen v. People*, 44 Mich. 267.) The act in question does not distinctly state the object to which the tax is to be applied. (*Sun Mut. Ins. Co. v. City of N. Y.*, 10 Sand. 15; *People v. Sup'rs of Orange Co.*, 17 N. Y. 235; *People v. Home Ins. Co.*, 92 id. 328; *People v. Sup'rs of Kings Co.*, 52 id. 566, 568, 569.) When a statute is challenged as in conflict with the fundamental law, a clear and substantial conflict must be found to exist to justify its condemnation; but when found, courts must not hesitate to condemn. (*Walcott v. People*, 17 Mich. 76; *In re N. Y. El. R. R. Co.*, 3 Abb. [N. C.] 401, 413.) The tax in question here is a general tax for State purposes, as opposed to a local tax for local objects. (10 Sandf. 14; *People v. Sup'rs of Chenango*, 8 N. Y. 326, 327.)

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James E. Kelly for appellants. The act of 1885 (Chap. 483), violates section 20, of article 3 of the Constitution, in that it does not distinctly state the object to which the tax provided for shall be applied. (*A. T. & S. F. R. R. Co. v. Woodcock*, 18 Kan. 20; *People v. Sup'rs of Kings Co.*, 52 N. Y. 556.)

Robert Sewell for appellants. The constitutional requirement (Art. 3, § 20), with regard to stating the object to which the tax shall be applied, is not met by the law of 1885 (Chap. 483). (*People v. Sup'rs of Orange Co.*, 17 N. Y. 235; *People v. Home Ins. Co.*, 92 id. 326.)

E. L. Fancher, John E. Parsons, Charles A. Davison and S. B. Brownell for appellants. The Constitution requires that "every law which imposes, continues or revives a tax shall distinctly state the tax and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object." (Const., art. 3, § 20; *People v. Sup'rs of Kings Co.*, 52 N. Y. 566.) The terms employed in the act are in effect a delegation of legislative authority, for not having been previously defined by the legislature and being incapable of definition, the disposition of the tax is left to the arbitrary discretion of the comptroller. For this reason the act is unconstitutional and void. (*People v. Sup'rs of Kings Co.*, 52 N. Y. 556, 557, 559.) The words, "to the use of the State," in the act are so vague and indefinite that they require to be made clear by supplementary legislation. (*People v. Sup'rs. of Kings Co.*, *supra.*) The act of 1885 is in contravention of the constitutional provision that requires every law that imposes a tax to distinctly state the object to which it is to be applied. (*People v. Sup'rs. of Orange Co.*, 17 N. Y. 235; *People v. Sup'rs. of Kings Co.*, *supra*; *People v. Home Ins. Co.*, 92 N. Y. 328.)

Horace Russell for appellants. The act is unconstitutional in that it does not sufficiently state the object to which the tax is to be applied without referring to other laws to fix such

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object. (Const., art. 3, § 20; Deb. Const. Conv. 1846, Crosswell & Sutton, 727; *People v. Home Ins. Co.*, 92 N. Y. 328; 3 Abb. Ct. App. 539.) The statement of the object of the tax involves a delegation of legislative duty. It is, therefore, unconstitutional. (*People v. Sup'rs of Kings Co.*, 52 N. Y. 556; Cooley's Const. Lim. 116.)

Hugh Reilly, district attorney, and *Mark Cohn* for respondent. Courts will not determine a statute to be unconstitutional except in a very clear and certain case, nor will they restrain or hamper, without obvious necessity, the scope and range of the legislative authority. (*People v. Fire Ass'n of Phil.*, 92 N. Y. 324; *People v. Sup'rs of Orange Co.*, 17 id. 241; *People v. Home Ins. Co.*, 92 id. 344, 345; *Walcott v. People*, 17 Mich. 68.) The Law of 1885 (Chap. 483, sufficiently states the object to which the tax is to be applied. (*People v. Home Ins. Co.*, 92 N. Y. 335; Const., art. 7, § 2; 1 R. S. 493; id. [7th ed.] 496, 500, 501; *People v. Sup'rs of Orange Co.*, *supra*; *S. C.*, 27 Barb. 593; 2 R. S. [7th ed.] 1276, §§ 32, 33.) The provisions of section 20 of article 3 of the Constitution are intended to apply only to laws levying a tax on property; and do not apply to the duty or tax required to be paid by this law. (*People v. Moring*, 3 Abb. Ct. App. 539; *Sun Mut. Ins. Co. v. City of N. Y.*, 5 Sandf. 10, 14; *Westinghausen v. People*, 6 N. W. Rep. 641; 13 U. S. Stat. at Large, 285, §§ 124-126; id. 287, §§ 126-151; *Wright v. Blakeslee*, 101 U. S. 174; *Springer v. U. S.*, 102 id. 586; *Strode v. Comm.* 52 Penn. St. 181, 188; *Clymers v. Comm.*, id. 185; *Carpenter v. Comm. of Pa.*, 17 How. [U. S.] 456; *In re Short*, 16 Pa. St. 63; *Eyre v. Jacob*, 14 Gratt. 422; *Miller v. Comm.* 27 id. 110, 117; *Tyson v. State*, 28 Md. 578.) The taxing power of the legislature, except as restrained by the express provisions of the Constitution, may be said to be unlimited. (Cooley on Tax. 5, 7; *People v. Mayor of Brooklyn*, 4 N. Y. 429; *Bertholf v. O'Reilly*, 74 id. 509-515; *Stuart v. Palmer*, id. 183-188; *Walcott v. People*, 17 Mich. 68; *People v. Eq. T. Co.*, 96 N. Y. 387,

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396; *International Bk. v. Bradley*, 19 id. 245, 250; *Haynes v. James*, 17 id. 316; *People v. Main*, 20 id. 434; *In re Trustees of N. Y. P. E. Pub. School*, 31 id. 574, 580.) The right to inherit or succeed to property is not an inherent, natural, or an absolute right; neither is the right to dispose of property after one's death by bequest or devise. These rights are clearly all the creatures of the civil or municipal laws, and accordingly are in all respects regulated by them. (2 Blackst. Com. 10, 11, 12, 13.) The State may change and modify them at any time, or abolish them altogether. (*Eyre v. Jacob*, 14 Gratt. 422; *Miller v. Comm.* 27 id. 110, 117; *Strode v. Comm.* 52 Pa. St. 181; *Olymers v. Comm.* id. 185; *Tyson v. State*, 28 Md. 578; *In re Short*, 4 Harris, 63; 3 R. S. [7th ed.] 2213, § 19; *Miller v. Miller*, 18 Hun, 507.) None of the various objections in this case can be raised by any of the appellants. None of them are relatives of the deceased. They are all strangers, and no vested rights of theirs are affected. (Laws of 1865, chap. 368, § 6; Laws of 1875, chap. 343, § 5; Cooley on Const. Lim. [3d ed.] 163, 164; *Sinclair v. Jackson*, 8 Cow. 543.)

EARL, J. Mary McPherson died in the city of Albany on the 6th day of February, 1886, leaving a will which was admitted to probate by the surrogate of Albany county. In her will she bequeathed legacies to various persons who were in no way related to her, and upon the petition of the district attorney of that county the surrogate ordered the executors named in the will to pay the succession tax imposed by chapter 483 of the Laws of 1885. The executors and several of the legatees appealed from the decision of the surrogate to the General Term and from affirmance there to this court. The claim on the part of the appellants is that the act of 1885 is, for various reasons, unconstitutional and void, that the tax was not, therefore, lawfully imposed, and that its collection and payment cannot be rightfully enforced.

The first section of the act provides that "after the passage

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of the act all property which shall pass by will, or by the intestate laws of this state from any person who may die seized or possessed of the same while being a resident of the State, or which property shall be within this State, or any part of such property, or any interest therein, or income therefrom, transferred by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, or to a body politic or corporate, in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled, in possession or expectancy, to any property or the income thereof, other than to or for the use of father, mother, husband, wife, children, brother and sister and lineal descendants born in lawful wedlock, and the wife or widow of a son and the husband of a daughter, and the societies, corporations and institutions now exempted by law from taxation, shall be and is subject to a tax of \$5 on every \$100 of the clear market value of such property, and at and after the same rate for any less amount, to be paid to the treasurer of the proper county and in the city and county of New York to the comptroller thereof, for the use of the State, and all administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed."

We entertain no doubt that such a tax can be constitutionally imposed. The power of the legislature over the subject of taxation, except as limited by constitutional restrictions, is unbounded. It is for that body, in the exercise of its discretion, to select the objects of taxation. It may impose all the taxes upon lands, or all upon personal property, or all upon houses or upon incomes. It may raise revenue by capitation taxes, by special taxes upon carriages, horses, servants, dogs, franchises and upon every species of property and upon all kinds of business and trades. (*People v. Mayor of Brooklyn*, 4 N. Y. 419; *Stuart v. Palmer*, 74 id. 183; *People v. Equitable Trust Co.* 96 id. 387; *Portland Bk. v. Apthorp*, 12 Mass. 252; *Cooley on Taxation* 7.) Taxes upon legacies and inherit-

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ances have been approved generally by writers upon political economy and systems of taxation, and no tax can be less burdensome and interfere less with the productive and industrial agencies of society. Such taxes were imposed in Rome two thousand years ago, and are now imposed in England and several of the continental countries of Europe, and in the States of Pennsylvania, Maryland and Virginia, and perhaps other States of this country. (*Williams' Case*, 3 Bland's Ch'y R. 186, 259; *Eyre v. Jacobs*, 14 Gratt. 422; and in 1864 (13 U. S. Stats. at Large, 287) a tax was imposed by the Federal government upon successions to real estate. The acts imposing such taxes have frequently come before the courts and have uniformly been upheld. (*Carpenter v. Comm. of Penn.* 17 How. 456; *Scholey v. Rew*, 23 Wall. 331; *Clapp v. Sampson*, 94 U. S. 589; *Wright v. Blakeslee*, 101 id. 174; *Mason v. Sargent*, 104 id. 689; *In re Short's Estate*, 16 Pa. 63; *Stinger v. Comm.*, 26 id. 422; *Comm. v. Freedley*, 21 id. 33; *Strode v. Comm.*, 52 id. 181; *Miller v. Comm.*, 27 Gratt. 110; *Tyson v. State*, 8 Md. 578; *State v. Dorsey*, 6 Gill, 388; *Williams' Case*, Bland's Ch. R. 186.) The case of the *State v. Dorsey*, was a curious one, possible only under a state of society long since passed in this country. There the bequest of freedom to a slave was held to be a legacy within the meaning and operation of the Maryland act imposing taxes upon legacies, and the executor was compelled to pay it.

It is not very important to determine in this case whether the act of 1885 is to be regarded as imposing a tax upon property or upon the succession or devolution of property by will or intestacy. In either case it is a special tax. In the one case it is a tax upon the particular class of property, and in the other case a tax upon the succession or devolution of property, or the right to receive property in the cases mentioned in the statute. Whether it be one or the other it is free from constitutional objection. It has never been questioned that the legislature can impose a tax upon all sales of property, upon all incomes, upon all acquisitions of property, upon all business and upon all transfers. Taxes of a similar

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character were quite extensively imposed by the acts of congress passed during the late civil war. If this be regarded as a tax upon property, then it is free from constitutional objection if it be equally imposed and properly apportioned upon all the property of the class to which it belongs. A tax imposed for the general welfare upon a particular house, or the houses of a particular neighborhood, would be amenable to constitutional objection, but if imposed upon all the houses in the State, then it is a tax imposed upon all the property of that class, and is amenable to no objection.

It is also objected that this tax is not constitutionally imposed because there is no compliance in the act with section 20 of article 3 of the Constitution of this State, which provides that "every law which imposes, continues or revives a tax shall distinctly state the tax and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object." Section 1 of this act requires that this tax shall be paid "for the use of the State," and this is the only designation of the object to which the tax is to be applied. If we were obliged to hold that this constitutional provision is applicable to this case, we should have difficulty to determine that the object of the tax is sufficiently stated. It has been held that the object is sufficiently stated if the act imposing a tax provides that it shall be paid to the credit of the general fund. (*People v. Sup'rs of Orange Co.*, 17 N. Y. 239; *People v. Home Ins. Co.*, 92 id. 335.) The decision which first announced this doctrine greatly impaired the value of the constitutional provision, because when the tax has once been paid into the general fund it may be appropriated by the legislature to any of the innumerable objects, ordinary and extraordinary, for which the State may need money; and thus any information given to members of the legislature, or to taxpayers, by such a statement of the object of the tax, is more illusory than real. But it must be assumed that the constitutional provision still has some value, and it should not be entirely nullified by judicial construction, as it would be if we should hold that this act sufficiently states

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the object of the tax within the meaning of the Constitution. But we are of opinion that this section of the Constitution is not applicable to this case. In terms it applies to every tax which the legislature can impose, and is not confined to a property tax. It is not even by its terms confined to a general tax embracing the whole State; but the language, literally construed, is broad enough to embrace every local tax imposed for local purposes. As stated above, taxes may be imposed upon a great variety of objects. They may be direct or indirect, special or general, and they may be imposed in the shape of excise and licenses, upon hawkers, peddlers, auctioneers, insurance agents, liquor dealers and others. All the contributions for the support of the government, enforced from individuals in the various ways mentioned, are, properly speaking, taxes. Notwithstanding the general language of the section referred to, we do not think it was intended to apply to every tax which the legislature could impose, and so it has been held.

The object of the constitutional provision was to convey information to the members of the legislature and to the people, and it should have a practical construction, with a view to accomplish its purpose so far as attainable, and to carry out the policy which we may assume dictated it.

The tax imposed by this act is a permanent one. It is always uncertain upon whom it will fall and how much revenue it will produce. It would have been impossible for the legislature, perhaps years in advance, to specify the particular objects to which the tax should be applied, and we are of opinion that this section of the Constitution was intended to apply to the annual recurring taxes known at the time of the adoption of the Constitution and imposed generally upon the entire property of the state. The legislature would know definitely the objects for which such taxes were imposed, and could anticipate, with some certainty, the amount which they would produce; and in their imposition it was deemed important by the framers of the Constitution that the object of the tax should be stated. But we do not think that the policy embodied in the section had any reference to special

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taxes which may be collected in a variety of ways under general laws, such as auction duties, excise duties, taxes on business or particular trades, avocations or special classes of property. It has been held in several states where constitutional provisions required that property taxes should be equal and uniform, that such provisions had reference only to general, annual recurring taxes upon property generally, and not to special taxes upon privileges or special or limited kinds of property. It was said in *Sun Mutual Insurance Company v. City of New York* (5 Sand. R. 10), by OAKLEY, Ch. J., in speaking of this constitutional provision, that it might be "seriously doubted whether it ought not to be construed as relating exclusively to the imposition of a general tax for State purposes, and not at all to the imposition of a local tax for local objects." In *People v. Moring* (3 Abb. [N. Y. Ct. App., Dec.] 539), the court had under consideration the acts of 1846 and 1866, imposing duties upon auctioneers and brokers, and the acts were challenged as in contravention of this section of the Constitution, and HUNT, J., writing the opinion of the court, expressed concurrence with the intimation of Judge OAKLEY in the case last cited, and said that this section "was not intended to be applied to laws which impose duties, fees or excises on particular professions, classes of trades or individuals, but that the same relates only to a general tax upon the property of the State;" that "this section, I have no doubt, contemplates a general tax upon all the property of the State and was not intended to be satisfied with, or to apply to a local tax upon a particular section, or to a tax imposing fees or duties upon trades or individuals, although the same are direct taxes equally as if imposed upon the entire property of the State." It was said by FINCH, J., in *People v. Fire Association of Philadelphia* (92 N. Y. 311), that the tax covered by the constitutional provision is one general in its provisions and coextensive with the State.

It is thus seen that there are cases where the language of this section of the Constitution must be restricted by construction, and we think this is one of them.

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✓ This tax is imposed according to the value of the legacy and collateral inheritance liable to be taxed, and hence there must be some mode of ascertaining that value; and for that purpose judicial action is requisite at some stage of the proceeding before the liability of the taxpayer becomes finally fixed. He must have some kind of notice of the proceeding against him, and a hearing or an opportunity to be heard in reference to the value of his property, and the amount of the tax which is thus to be imposed. Unless he has these, his constitutional right to due process of law has been invaded. (*Stuart v. Palmer*, 74 N. Y. 183; *County of San Mateo v. S. Pac. R. R. Co.*, 8 Sawyer, 238; *Hagar v. Dist. No. 108*, 111 U. S. 701.) This act is assailed as unconstitutional and void because it is claimed it does not give the taxpayer such notice and hearing.

✓ While the provision for notice is not as clear and explicit as it might have been, yet we are constrained to believe that it is sufficient. Section 13 provides that: "In order to fix the value of the property of persons whose estates are subject to the payment of the tax, the surrogate, upon the application of any interested party, or upon his own motion, shall appoint some competent person as appraiser as often as and when occasion may require, whose duty it shall be forthwith to give such notice by mail, and to such persons as the surrogate may by order direct, of the time and place he will appraise such property, and at such time and place to appraise the same at its fair market value and make a report thereof to the surrogate, together with such other facts in relation thereto as the surrogate may by order require, to be filed in the office of the surrogate; and from this report the surrogate shall forthwith assess and fix the then cash value of all estates, annuities and life estates or term of years growing out of said estate, and the tax to which the same is liable, and shall immediately give notice thereof by mail to all parties known to be interested therein." With a view of upholding the constitutionality of the act, this and all the other sections of the act must be liberally construed, as no act of the legislature

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may be condemned as unconstitutional, if by fair implication or any just construction of its language it can be upheld. The surrogate who has admitted a will to probate, or granted letters of administration, will ordinarily have in his possession information as to the persons interested in the estate to be administered; and hence this section imposes upon him the duty of selecting the persons to whom notice is to be addressed by the appraisers; and, as all persons interested are entitled to notice, it is a fair inference that it was intended that he should direct notice to be given to all such persons. He is a judicial officer in whose court proceedings are conducted in an orderly manner, and all persons interested in any question to be determined by him are entitled to notice and a hearing. It was intended that this proceeding for the imposition of a tax should be conducted in an orderly way as is required in other proceedings in his court. Therefore, when the section provides that he shall designate by order to whom the notice is to be given, it is necessarily implied that he shall designate all the persons entitled to notice. If he should omit to do so, it would be an error on account of which any tax imposed upon the person not notified or heard would be invalid as having been imposed without jurisdiction.

It is also provided, that, immediately after he has assessed the tax, the surrogate shall "give notice thereof by mail to all parties known to be interested therein." This gives a further opportunity to the taxpayer to be heard. Upon receiving the notice, if he has had no prior notice or hearing, he may apply to the surrogate and ask for one, and it would be his duty to grant it. The proceeding is in court before a judicial officer and whatever a taxpayer can ask as a matter of constitutional right, it is the duty of the surrogate to grant.

Then there is the right of appeal provided for in the same section. Any person dissatisfied with the appraisement or assesment may appeal therefrom to the surrogate of the proper county, on paying or giving security to pay all costs and the tax as fixed by the court. Upon such appeal there is another opportunity to be heard. The appeal is not limited to

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questions of law, but may be taken to the surrogate upon both the law and the facts, and he has ample power to correct any error brought to his attention. For the purpose of making such correction, he is not bound by the estimate of the appraisers, or by the facts which appeared before him; but he may hear such new evidence and allegations as may be properly presented to him.

There is still further opportunity to be heard under section 16 of the act. It is there provided, that, if it shall appear to the surrogate's court, that any tax accruing under the act has not been paid, according to law, it shall issue a citation, citing the persons interested in the property liable to the tax before the court on a day certain, not more than three months after the date of such citation, and show cause why the tax should not be paid; that the service of such citation, and the time, manner and proof thereof, and the hearing and determination thereon, and the enforcement of the determination or decree shall conform to the provisions of the Code of Civil Procedure for the service of citations now issuing out of surrogates' courts, and the hearing and determination thereon and its enforcement. So, too, under this section, after the tax has been imposed, no person can be compelled to pay it until a citation has been regularly served upon him and he has had ample opportunity to be heard. Upon the return of the citation, it is not specified in the section what cause can be shown against the payment of the tax; but it is clear that the person thus cited may allege any reason whatever which shows that he ought not to pay it. He may answer that he has not had an opportunity to be heard upon the appraisal, and that, therefore, the tax as to him is void. He may show any error affecting the validity of the tax, or that he has never received and never will receive the inheritance or legacy; and it would undoubtedly be a justification for refusing to pay that he had absolutely renounced and refused to accept or receive the inheritance or legacy. If the surrogate should err in his decision, there would be the right of appeal to the Supreme Court, and the

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same right which parties have in other cases to bring to this court for review the decisions of surrogates' courts.

So, in all of these modes we think there is sufficient provision for notice and hearing for all parties interested in the tax, and we have no doubt that the act secures to every taxpayer due process of law so far as it is applicable to cases of taxation.

It is also objected that the act confers powers upon surrogates' courts not authorized by and contrary to the Constitution. There is nothing in the Constitution which in any way specifies or defines the powers or duties of surrogates. They are recognized in various sections of the Constitution and they have been known to the laws of the State since the foundation of our government. Their jurisdiction has from time to time been defined in the statutes, and from time to time extended and enlarged. Surrogates' courts have always had jurisdiction of the administration, adjustment and settlement of the estates of deceased persons, and the imposition and collection of this tax are simply incidents in the final settlement and adjustment of such estates, and are in no way foreign to the jurisdiction which has generally been exercised by such courts, certainly not so foreign as to make the act obnoxious to any constitutional objection.

The learned brief submitted by Mr. Hun, on the part of the appellants, points out many imperfections in this act, and shows that there will be great embarrassment and difficulty in executing the act in the cases of contingent remainders and expectant estates, and in some other cases. The criticisms made by him upon the act are well worthy of the attention of the legislature. But even if in some of the respects pointed out by him it should be found that the act is inoperative and impracticable, yet on that account we see no reason for condemning the entire act. If it should be wholly inoperative in cases of contingent and expectant estates and in some other cases mentioned by him, yet it can operate without difficulty or embarrassment in the great majority of cases coming within its purview; a majority of persons having

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property die intestate, and a majority of those disposing of property by will do it by simple bequests or devises, and the cases of contingent and expectant estates are not very common. There is no reason, therefore, for condemning the whole act because possibly in some cases it could not have operation according to the intent of the legislature. We cannot say that the legislature would not have enacted it if they had known that it would be confined in its operation to simple cases of intestacy and wills containing nothing but absolute devises and bequests, as to which there is no difficulty or embarrassment in executing the act.

We are, therefore, of opinion that there is no constitutional objection to this act which affects this case, and that the judgment should be affirmed, with costs.

All concur except RAPALLO, J., not voting.

Judgment affirmed.

SAMUEL WEEKS et al., Appellants, v. JACOB WEEKS CORNWELL et al. Respondents.

W. died, leaving a large amount of real and personal property, a widow and no descendants. By his will he gave to his widow absolutely certain real and personal estate and a life estate in four lots in the city of New York. The will contained seventeen clauses, each devising parcels of land to his executors in trust, to pay the net income to a person named during life. The land mentioned in each clause was, on the death of the life beneficiary, devised to his wife and heirs, or where there was no wife to his heirs or issue. In several of the clauses was contained a provision that the issue of such life beneficiaries as shall have died shall take the parents' share. A lot of land was also devised to P. in fee, and one to each of two servants of the testator, D. and C. By the twenty-fourth clause the testator gave the residue of his estate, real and personal, not "bequeathed in fee or upon trust," to his executors, "to use the same as in their judgment they deem to be for the best interest" of the whole estate; and, to raise money for that purpose, he authorized them to mortgage "the piece or parcel of land being the residue and remainder" of his estate, and after paying taxes, etc., and such amounts as they might deem necessary for

104	325
111	277
104	325
131	460
104	325
146	160

104	325
1166	377

104	325
78 AD	59

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repairs, etc., "to divide and pay the remainder at any time within ten years to each and every of my legatees hereinbefore named," except D. and C., "in the proportion in which his, her or their specified legacies hereinbefore named and bequeathed bear to each other, the heirs of such legatee as may have died to take the share which said legatee would, if living, have been entitled." By the twenty-fifth clause, upon the termination of the real estate trusts where the fee was undisposed of, the testator gave "the fee of said real estate trust property" to his legatees, excepting D. and C., to be divided among them in the same proportion as specified in the twenty-fourth clause; the testator declaring his meaning to be to regard each of his legatees, except D. and C., "a legal heir" to his estate, "limited to the said trust property in the proportion named." The real estate referred to in the twenty-fourth and twenty-fifth clauses consisted of the four lots devised to the widow for life. In an action brought after the death of the widow, for partition of said real estate, *held* that under the twenty-fifth clause said real estate was legally devised, the devisees being the seventeen persons named as beneficiaries in the seventeen trusts, together with P.; that the proceeds of sale should be divided among them, as to the seventeen life beneficiaries, in proportion to the value of the specific real estate from which they were respectively entitled to the income, and as to P., in proportion to the value of the fee of the land given to him; that the only real estate trust attempted to be created by the twenty-fourth clause was to mortgage it, which trust was invalid because not for the benefit of legatees or for the purpose of satisfying any charge upon the land (1 R. S. 728, § 55); that even if valid it vested no estate in the trustees (§ 56) but was valid only as a power, and so in any event it did not suspend the power of alienation, or prevent the vesting of the estate in the devisees mentioned in the twenty-fifth clause.

(Argued December 18, 1886· decided February 1, 1887.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made May 4, 1886, denying a motion for a new trial, made pursuant to section 1001 of the Code of Civil Procedure, after entry of an interlocutory judgment.

This action was for partition.

Jacob Weeks died in the city of New York on the 9th day of September, 1881, leaving a widow, a will, a large amount of real and personal property and no descendants. His widow died on the 7th day of April, 1882; both he

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and she were, at death, upwards of eighty years old. In his will, which was dated May 9, 1881, he gave to his wife absolutely a large amount of real and personal property, and he devised to her during her life four lots, and the buildings erected thereon, situated upon Fifth avenue in the city of New York, valued at \$675,000. He devised several lots of land to his executors, upon trust, to collect the rents thereof during the life of his adopted son, Jacob Weeks Cornwell, and, after expending therefrom such amounts as they deemed necessary to keep the premises in good order and repair and properly insured against loss and damage by fire, to pay the remainder of such rents, when collected, to Cornwell, during his life; and at his death the said lots with the buildings thereon were devised to his wife, Virginia Cornwell, and to his children, Ida Van Cott, Clarissa Lyon and Millard Filmore Cornwell, share and share alike, the issue of such as may have died to take the share to which his, her or their parent would, if living, have been entitled. In sixteen other clauses of the will the testator devised particular parcels of land to his executors, upon similar trusts, for other beneficiaries. After the death of each life beneficiary the land mentioned in each clause was devised to the wife and heirs of such beneficiary, share and share alike, or, where there was no wife, to the heirs or issue of such beneficiary; several of the clauses contain a provision that the issue of such life beneficiaries as shall have died shall take the parents' share. The testator also devised in fee a lot of land to William V. Parschall, and in the twenty-second and twenty-third clauses he devised in fee a lot of land to each, Ann Davey and Hugh Collins, two of his servants. By the twenty-seventh clause the testator authorized and directed his executors to repair or rebuild the buildings upon any of the lots of land devised to them in trust if the buildings should be partially injured or wholly destroyed by fire during the continuance of the trust, and in order to raise money for that purpose he empowered them to mortgage the parcel or parcels of land upon which the buildings should be situated and charge the payment of such

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mortgage upon such parcels of land respectively. By the twenty-ninth clause the testator authorized and directed his executors, in case he should die leaving any building or buildings upon any of the lots of ground devised in an unfinished state, or having executed any contract or contracts for the erection of any building thereon, to finish or complete such building, and for that purpose he empowered them to mortgage the parcel of land upon which such unfinished building might be situated, or to which such contract might relate, and charge the payment of the mortgage upon such parcels of land respectively. The thirtieth clause authorized and directed the executors immediately upon proving the will, or as soon thereafter as possible, to pay all taxes, assessments, mortgages or incumbrances whatsoever against the testator's property at the time of his death out of his personal estate, and if the personal estate should be insufficient for that purpose, then he directed that any deficiency that might exist should be paid out of the income of his entire estate, except the income from the property devised for life to his wife. By the thirty-first clause the testator authorized and directed his executors to pay the annual taxes and all assessments upon the property devised to them in trust out of the income thereof respectively, and directed his wife to pay the annual taxes and all assessments upon the property devised to her for life. He appointed his wife, Jacob Weeks Cornwell, Samuel Weeks, Jr., and George Washington Weeks, executors of his will. The twenty-fourth and twenty-fifth clauses of the will are as follows: "*Twenty-fourth.* All the rest, residue and remainder of my estate, real and personal, that I may own at the time of my death, and not hereinbefore bequeathed in fee or upon trust, I give, devise and bequeath to my said executors upon trust, to use the same as in their judgment they deem to be for the best interest of my whole estate, and in order to raise money for that purpose I empower them to mortgage the piece or parcel of land, being the residue and remainder of my estate and not hereinbefore

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disposed of in fee or upon trust, and after paying and keeping paid all taxes and assessments upon said property, and expending such amounts as they may deem necessary to keep the said premises in good order and repair, and properly insured against loss and damage by fire, to divide and pay the remainder at any time within ten years to each and every of my legatees hereinbefore named, except Ann Davey and Hugh Collins, in the proportion in which his, her or their specified legacies hereinbefore named and bequeathed bear to each other; the heirs of such legatee as may have died to take the share to which said legatee would, if living, have been entitled." "Twenty-fifth. Upon the termination of the real estate trusts herein contained, where I have not hereinbefore disposed of the fee of my real estate, I do hereby give, devise and bequeath the fee of said real estate trust property to each and every of my legatees herein named, except Ann Davey and Hugh Collins, to be divided among such legatees in the proportion in which his, her or their specific legacies hereinbefore named and bequeathed bear to each other. The heirs of such legatees as may have died to take the share to which said legatee would, if living, have been entitled; meaning and intending by this to regard each of my legatees, except Ann Davey and Hugh Collins, a legal heir to my estate, limited to the said trust property in the proportion named."

The real estate put in trust for the seventeen life beneficiaries was of the value of more than \$1,300,000. The testator owned at his death the same real estate which he owned at the date of his will, and it is conceded that the real estate referred to and disposed of in the twenty-fourth and twenty-fifth clauses consisted of the four houses and lots in Fifth avenue which were devised to his wife for life.

This action was commenced by certain of the heirs against the legatees and devisees mentioned in the will and other heirs of the testator for the partition of the four houses and lots, the claim of the plaintiffs being that the disposition of them made by the will was illegal and void, that they

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descended to the testator's heirs and were to be divided among them as if he had died intestate. The court at Special Term held that, under the twenty-fifth clause the property was legally and effectually devised, and that the devisees in fee were the seventeen persons mentioned as beneficiaries in the seventeen trusts created by the will, together with Parschall, who was a devisee of a parcel of land in fee; and by the interlocutory judgment it ordered that the four houses and lots should be sold, and the proceeds thereof divided, as to the seventeen beneficiaries, in proportion to the value of the specific real estate from which they were respectively entitled to the income, and as to Parschall in proportion to the value of the fee of the land given to him.

E. Ellery Anderson, S. H. Thayer, A. H. Stoiber, F. E. Smith, Wm. T. Graff, for appellants. The fact that the twenty-fourth clause of the will is void is no reason why it should not be referred to to ascertain the testator's meaning. (*Van Nostrand v. Moore*, 52 N. Y. 12.) The remainder did not vest because the persons who are to take cannot be ascertained until the death of all the seventeen life beneficiaries. (3 R. S. [Banks 7th ed.] 2176, § 13; *Hobson v. Hale*, 95 N. Y. 588, 610-614; *Knox v. Jones*, 47 id. 389-398; *Smith v. Edwards*, 88 id. 92, 104; *Purdy v. Hayt*, 92 id. 446; *Rice v. Barrett*, 102 id. 161.) The seventh conclusion of law and the seventh clause of the judgment, which hold that the seventeen life beneficiaries and William V. Parschall are the only persons entitled to the Fifth avenue property, are erroneous. (*Giles v. Nelson*, L. R. 6 H. L. Cas. 24.) Under the construction which limits the words "legatees herein named" to the seventeen life beneficiaries and to William V. Parschall the remainders are future estates, and futurity is of the essence of the gift. These remainders cannot be accelerated and must, therefore, fall with the intervening trust. (*Smith v. Edwards*, 88 N. Y. 92, 103, 109; *Benedict v. Webb*, 98 id. 460; *Hobson v. Hale*, 95 id. 588, 613; *Rice v. Barrett*, 102 id. 161.) If a clause in a will

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offend against the rule against perpetuities, in construing the will such clause cannot be disregarded, but must be read as the expression of the testator's intention as though no such rule existed. (*Heasman v. Pearse*, L. R. 7 Ch. App. Cas. 275, 283; *Dungannon v. Smith*, 12 Cl. & Fin. 546, 625, 626; *Pearks v. Moseley*, 5 Eng. L. R. App. Cas. 714; *Rice v. Barrett*, *supra*.)

W. B. Putney for Martha Trask, appellant. The twenty-fourth and twenty-fifth clauses of the will are in violation of the statute against perpetuities. (*Hobson v. Hale*, 95 N. Y. 614, 615; *Colton v. Fox*, 67 id. 349; *Brewer v. Brewer*, 11 Hun, 147; 72 N. Y., 603; *Post v. Hover*, 33 id. 593; *Garvey v. McDevitt*, 72 id. 556; *Rose v. Rose*, 5 Abb. Ct. App. Dec. 108; *Hawley v. James*, 16 Wend. 61; *Rice v. Barrett*, 102 N. Y. 161.) It is against the settled rules of construction to strike out any words from a will because they offend against the perpetuity rule. (*Heasman v. Pearse*, L. R. 7 Ch. App. 283; *Pearks v. Moseley*, L. R. 5 App. Cas. 719; *Colton v. Fox*, 67 N. Y. 349; *Wetmore v. Parker*, 52 id. 464; *Van Nostrand v. Moore*, id. 21; *Post v. Hover*, 33 id. 597; *Smith v. Edwards*, 88 id. 102; *Schöttler v. Smith*, 41 id. 328; *Burrell v. Boardman*, 43 id. 254; *Waring v. Waring*, 17 Barb. 555.) The trust of the twenty-fourth clause of the will was intended by the testator to be subser-vient to the prior real estate trusts. (3 Jarm. on Wills [Rand. & Talcott's ed.] 67, 72, 85; *Bennett v. Garlock*, 10 Hun, 339.) The testator did not intend by the last sentence of the twenty-fifth clause to make any different disposition from what he had just before made, or at any different time. (*Benedict v. Webb*, 98 N. Y. 465.)

Flamen B. Candler for respondents. The intention of the testator must be carried into effect if that can be done without violating any rule of law. (3 R. S. [Bank's 7th. ed.] 2205, § 2; *Keteltas v. Keteltas*, 72 N. Y. 312, 314, 315.) An intention which would invalidate a will is never imputed to a testator if it can be avoided. (*Manice v. Manice*, 43 N. Y.

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303, 362, 368, 371; *DuBois v. Ray*, 35 id. 162; *James v. Beasley*, 14 Hun, 520, 523.) The law prefers a construction of a will which prevents a partial intestacy to one which permits it. (*Byrnes v. Baer*, 86 N. Y. 210.) The twenty-fourth section of the will is void, as by that section it was sought to create a trust not authorized by the laws of this State. (3 R. S. [Bank's 7th ed.] 2181, § 55.) The limitation over of the remainder by the twenty-fifth section of the will, is not affected or impaired by the failure for legal invalidity of the trust attempted to be created by the twenty-fourth section; and as those two sections are distinct, separate and independent of each other, the remainder is not defeated by cutting off the trust. (1 R. S. 729, § 61; *Manice v. Manice*, 43 N. Y. 303-384; *Oxley v. Lane*, 35 id. 340-350; *Harrison v. Harrison*, 36 id. 543, 547; *Van Schuyver v. Mulford*, 59 id. 426, 432; *Wager v. Wager*, 96 id. 164-171; *McLean v. Freeman*, 70 id. 81-85; *Adams v. Perry*, 43 id. 487; 3 R. S. [Bank's 7th ed.] 2182, § 61.) The twenty-fourth and twenty-fifth sections of the will do not provide for one general scheme; nor are those two sections so connected or interwoven with each other as to form one entire gift, so as to make the remainder over void; nor does the vesting of the remainder depend upon any condition annexed to either of those sections; and, as those sections are severable and distinct from each other the devise, under the twenty-fifth section, must be sustained. (*Rice v. Barrett*, 102 N. Y. 161; *Garvey v. McDevitt*, 72 id. 556; *Knox v. Jones*, 47 id. 389; *Coster v. Lorillard*, 14 Wend. 265; *Van Nostrand v. Moore*, 52 N. Y. 12; *Holmes v. Mead*, id. 332; *Harris v. Clark*, 7 id. 242; *Benedict v. Webb*, 98 id. 460-466; *Savage v. Burnham*, 17 id. 561; *Livingston v. Green*, 52 id. 118-123; *McKinstry v. Sanders*, 2 Sup. Ct. [T. & C.] 181, 187; *S. C.* 68 N. Y. 662; *Moore v. Lyons*, 25 Wend. 119; *Selden v. Vermilya*, 3 N. Y. 325; *Manice v. Manice*, 43 id. 303; *Robert v. Corning*, 89 id. 225; *Adams v. Perry*, 43 id. 487; *Van Schuyver v. Mulford*, 59 id. 426.) The twenty-fifth section of the will is valid, and by that section the testator legally and effectually

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disposed of the Fifth avenue property to his legatees by devising to them absolutely the fee of the same, postponed in enjoyment only, until the termination of the widow's life estate therein. (1 Jarman on Wills, 643; *Manice v. Manice*, 43 N. Y. 368.) The power to alienate the Fifth avenue property is not suspended by the twenty-fifth section of the will, and the devise of the remainder in fee of that property by that section is valid. (3 R. S. [Bank's 7th ed.] 2176, §§ 14, 15.) The remainder limited over by the twenty-fifth section is a vested one, and by that section the fee of the Fifth avenue property, upon the testator's death, became absolutely vested in his legatees subject only to the widow's life estate. (3 R. S. [Bank's 7th ed.] 2176; 1 R. S. 723 [Old ed.]; *Ives v. Legge*, 3 Tr. R. 488; 4 Kent's Com. 204; *Leonard v. Kingsland*, 12 Daly, 485; *Moore v. Littel*, 41 N. Y. 66; 2 Washburn on Real Prop., 510; *Livingston v. Greene*, 52 N. Y. 118, 123; *Moore v. Lyons*, 25 Wend. 144; *Embury v. Sheldon*, 68 N. Y. 227, 236; *Hennessy v. Patterson*, 85 id. 91; *Manice v. Manice*, 43 id. 368; *Purdy v. Hayt*, 92 id. 446; *DeKay v. Irving*, 5 Den. 646.) The testator, in devising the remainder in fee of the Fifth avenue property by the twenty-fifth section of his will to his "legatees," did not thereby intend to include the remaindermen, who would answer to that description only upon the termination of all the trusts created by him, but thereby intended to include his primary beneficiaries, to wit, the seventeen life tenants and the one devisee in fee. (*Damrat v. Jones*, 2 Dem. 602; *In re Karr*, 2 How. Pr. [N. S.] 405; *Smith v. Edwards*, 88 N. Y. 92, 103; 3 R. S., 2287, § 52 [Old ed. 66]; *Mowatt v. Carow*, 7 Paige, 328; *Bishop v. Bishop*, 4 Hill, 138; *Dunn v. Bagshaw*, 6 Term. R. 518; *Van Beuren v. Dash*, 30 N. Y. 393, 444; *Quackenbos v. Kingsland*, 102 id. 128; *Leonard v. Kingsland*, 12 Daly, 485; *Livingston v. Greene*, 52 N. Y. 118; *Moore v. Lyons*, 25 Wend. 119; *Converse v. Kellogg*, 7 Barb. 590; *Embury v. Sheldon*, 68 N. Y. 227; *Wetmore v. Parker*, 52 id. 450, 463.) The standard of equalization among the "legatees" is the proportion in which his, her or

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their specific legacies hereinbefore named and bequeathed bear to each other; and each legatee's share is determined by taking the fee value of the property devised to him or her in fee or upon trust by the respective sections of the will, and then the aggregate fee value of all the property devised by all the sections, 3 to 21, inclusive, and the fractional part of each legatee will be as the value of the former bears to the value of the latter. (Code Civ. Pro., § 976; *Bailey v. Bailey*, 97 N. Y. 460-470; *Monarque v. Monarque*, 80 id. 320-324; *Sauter v. N. Y. C. & H. R. R. Co.*, 6 Hun, 446, 451; *Davis v. Standish*, 26 id. 608, 616; *Schell v. Plumb*, 55 N. Y. 592; Laws of 1870, chap. 717, § 5; Code Civ. Pro., §§ 1569, 1570; *Jackson v. Brown*, 13 Wend. 437, 445.) The remaindermen to take in addition to the eighteen persons referred to, if they take at all, are those only who were in esse at the time of the testator's death. (1 Burrill's L. Dict. 297 [Tit. Class.]; *Lorillard v. Coster*, 5 Paige, 172, 185; *Campbell v. Rawdon*, 18 N. Y. 412; 1 Redf. on Wills, 379, 380, 385, 386; *De Witt v. De Witt*, 11 Sim. 41; 2 Jarman on Wills, 10, 616, 688, 712; *Holloway v. Holloway*, 5 Ves. 399; 2 Watson's Eq., 1282.) If the gift to the legatees includes, besides the eighteen persons, all those persons who will answer to the description of remaindermen when the trusts expire, it is, nevertheless, capable of enforcement, and the devise is not void. (*Monarque v. Monarque*, 80 N. Y. 320, 324.)

Abner C. Thomas for respondents. The title to the Fifth avenue real estate was not vested in the executors under the twenty-fourth clause. (1 R. S. 729, § 56; 1 Edm. Stat. 678, § 56; *Robert v. Corning*, 89 N. Y. 225; 23 Hun, 299.) Since the executors took no title under the twenty-fourth clause, the title vested at once in the "legatees" under the twenty-fifth clause, subject to the execution of the powers contained in the twenty-fourth clause, and the rule against perpetuities was not violated. (*Robert v. Corning*, 89 N. Y. 225; 23 Hun, 299; 1 R. S. 729, § 56.) The invalidity of the twenty-fourth clause will not prevent the property from passing to the devisees of the testator under the twenty-

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fifth clause. (*Van Kleek v. Dutch Church*, 6 Paige, 600; 20 Wend. 457; *James v. James*, 4 Paige, 115; 1 R. S. 729, § 61; 1 Edm. Stat. 679, § 61; *Rose v. Rose*, 4 Abb. App. Dec. 108; *Greene v. Denis*, 6 Conn. 293; *Ackerman v. Gordon*, 67 N. Y. 63; *Livingston v. Greene*, 52 id. 118; *Campbell v. Rawdon*, 18 id. 412; *Lorillard v. Coster*, 5 Paige, 172, 185, 217; *In re McClymant*, 16 Abb. [N. C.] 262; *Tucker v. Tucker*, 5 N. Y. 408-420.) If the intention of the testator was that the legatees should share in the proportions which the values of their life estates bore to the whole value of the Fifth avenue property, the computation made by the referee was correct, and the use of the Northampton tables for this purpose was justified by law. *Monarque v. Monarque*, 80 N. Y. 324; *Hollis v. Dren Theo. Sem.*, 95 id. 166; *Lauter v. N. Y. C. R. R. Co.*, 6 Hun, 446, 451; *Davis v. Standish*, 26 id. 608, 616; *Schell v. Plumb*, 55 N. Y. 592; Laws of 1870, chap. 717, § 5.)

John F. Coffin and *Martin J. Keogh* for respondents. The General Term had power on the appeal from the judgment of Mr. Justice LARREMORE, to modify judgment and grant a new hearing, and to send it to a referee to ascertain and report such facts as were essential to make a complete record in conformity with the judgment as modified. (Code of Civ. Pro., § 1317; *Gracie v. Freeland*, 1 N. Y. 228; *Tracy v. Talmadge*, 1 Abb. Pr. 460; *In re Opening Seventh Ave.*, 29 How. Pr. 180; *Salmon v. Gedney*, 75 N. Y. 479.) Although the twenty-fourth clause of the will is invalid, yet the court may refer to it for the purpose of deriving evidence as to the final intention of the testator in disposing of his property. (*Wetmore v. Parker*, 52 N. Y. 450, 464; *Lauter v. N. Y. C. & H. R. R. R. Co.*, 6 Hun, 446, 451; *Davis v. Standish*, 26 id. 608, 616; *Schell v. Plumb*, 55 N. Y. 592; *Monarque v. Monarque*, 80 id. 320, 324; Code of Civ. Pro., § 1570; *Nannock v. Horton*, 7 Vesey, 391; *Pirnie v. Purdy*, 19 Barb. 60.)

J. Montgomery Peters for repondents. The direction of the testator that on the death of the widow the property be

divided between those who are entitled to it in the proportion in which his, her or their specific legacies, etc., bear to each other, refers to that time. (*Manice v. Manice*, 43 N. Y. 303.) Although the gift to William V. Parschall, of his share in the Fifth avenue property is made by the same clause of the will by which it is made to the rest, a total failure of their interests in that property would not affect any right of his in it, as the gift to him is in no wise connected with the gifts to the others. (*Savage v. Burnham*, 17 N. Y. 571.)

EARL, J. This appeal imposes upon us the difficult duty of construing the twenty-fourth and twenty-fifth clauses of this will. These clauses were drawn with great unskillfulness and carelessness, and thus their meaning is very obscure and uncertain. As they concern and attempt to dispose of a very large amount of property, they must have been the subject of some deliberation, and the testator evidently had some meaning which is embodied, however inaptly, in the language used. What that meaning is, it is for us to ascertain, if we can. If it is unascertainable, the case is the same as if no attempt had been made to express any, and the language used can have no effect. If several meanings may be attributed to the language, each supported by equally strong reasons and probabilities, no one of them can be accepted, as that which the testator meant to express. Important rights cannot be based upon mere conjecture.

But, in the construction of wills as in the determination of questions of fact, and other questions of law, it is not to be expected that absolute certainty can always be attained. Upon questions of fact it is sufficient that there is a balance of evidence or probabilities in favor of one side or the other of the dispute, and upon such balance courts will rely in deciding the weightiest issues. So in the construction of written instruments, courts will scrutinize the language used, and however confused, uncertain and involved it may be, will give it that construction which has in its favor the balance of reasons and probabilities, and will act

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upon that. The intent of a testator may sometimes be missed, but such is the infirmity of language and human judgment that such a result is sometimes unavoidable. As said in Jarman on Wills (Vol. 1, p. 643): "In the construction of wills, the most unbounded indulgence has been shown to the ignorance, unskillfulness and negligence of testators. No degree of technical informality or grammatical or orthographical error, nor the most perplexing confusion in the collection of words, will deter the judicial expositor from diligently entering upon the task of eliciting from the contents of the instrument the intention of its author, the faintest traces of which will be sought out from every part of the will and the whole carefully weighed together."

The testator did not intend to die intestate as to any of his real estate, and it is therefore our duty, if we can, to so construe his will as to effectuate that intention. And we must also observe the rule which requires courts, if possible, so to construe any disputed provision in a will as to uphold it and make it valid, and thus enforce the maxim *ut res magis valeat quam pereat*.

The testator made such provision for his heirs as he desired, and by upholding these clauses in his will as the courts below have construed them, we think his intention will be most nearly observed.

The only real estate trust the testator attempted to create in the twenty-fourth clause, is one to mortgage the real estate therein mentioned. He devised and bequeathed all the residue of his real and personal estate to his executors upon trust to use the same as in their judgment they deemed to be for the best interest of his whole estate. The word "use" is wholly inappropriate to real estate. This was a disposition to take effect at his death, and he had previously in his will given to his wife a life estate in these houses and lots, and hence she, during her life, was entitled to the rents and profits, and for that reason the testator could not have intended that his executors were to use the houses and lots by receiving the rents and profits thereof. In writing that

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word the draughtsman must have had in mind mainly and most prominently the personal property. That was to be used for the benefit of his whole estate, and then it is specified how the real estate was to be used, to wit: By raising money upon it by mortgage, and that was the only use that could be made of it consistently with the prior disposition of it to his wife for life. What the testator intended was to give to his executors the right to use his personal and real estate, the former in any way for the best interest of his whole estate, the latter to raise money by mortgage for the benefit of his whole estate; and it was the personal property and the money thus realized, upon the real estate which, after paying and keeping paid all taxes and assessments upon the houses and lots and expending such amounts as the executors might deem necessary to keep the houses in repair and properly insured, which at any time within ten years they were to divide and pay to each and every of his legatees mentioned. It is clear that the words "to divide and pay the remainder," have no reference to the real estate. The word "pay" is not properly used to denote the distribution or division of real estate. The testator could not have intended to give his executors the power to divide and deliver the real estate to the legatees at any time within ten years, and thus put it in their power to interfere with his wife's life estate. Then, too, if those words relate to real estate, the twenty-fifth clause providing for the final disposition of the real estate was unnecessary. The twenty-fourth clause makes a final disposition of the personal property, including the balance of money realized by mortgaging the real estate, and the twenty-fifth clause makes a final disposition of the real estate.

Hence there was an attempt to create two trusts by the twenty-fourth clause: One was a trust to mortgage the real estate, and that was invalid because the mortgage was not for the benefit of legatees or for the purpose of satisfying any charge upon the land. (1 R. S., 728, § 55.) But even if valid, it would have vested no estate in the trustees as it is

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provided in section 56 that "a devise of land to executors or other trustees to be sold or mortgaged, when the trustees are not also empowered to receive the rents and profits, shall vest no estate in the trustees; but the trust shall be valid as a power, and the land shall descend to the heirs, or pass to the devisees of the testator, subject to the execution of the power." Section 58 provides that "where an express trust shall be created for any purpose not enumerated in the preceding sections, no estate shall vest in the trustees, but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, shall be valid as a power in trust;" and section 59 provides that "in every case where the trust shall be valid as a power, the land to which the trust relates shall remain in or descend to the persons otherwise entitled, subject to the execution of the trust as a power." Hence, whether the trust attempted to be created in the twenty-fourth clause was valid or invalid, it did not suspend the power of alienation, nor prevent the vesting of the estate in the devisees mentioned in the twenty-fifth clause.

It is not important to determine whether the attempted trust can have effect as a power, because if it can, it still in no way interferes with or affects the disposition of the real estate made in the twenty-fifth clause. It may, nowever, be stated that the power has not been executed and no party to this action claims that it ought to be, or that it is so definite in its objects that it can be.

There was also an attempt to create a trust in the personal property as above mentioned, which might last for ten years, and which was probably expected to terminate at the death of the widow within that time. It is not important to determine whether that is a valid trust, as it in no way concerns the real estate, and all the parties to this action have assumed it to be invalid.

There was nothing, therefore, in the twenty-fourth clause which could in any way interfere with or defeat the full and entire operation of the twenty-fifth clause. That provides

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that "upon the termination of the real estate trusts herein contained where I have not hereinbefore disposed of the fee of my real estate, I do hereby give, devise and bequeath the fee of said real estate trust property" to the legatees named. It is claimed by the appellants that the words "real estate trust herein contained" have reference to all the eighteen real estate trusts created or mentioned in the will, and hence that the real estate could not vest under that clause in the devisees mentioned until the termination of all of those trusts, and that so the clause is invalid for various reasons. But, we think, these words refer to the real estate trust mentioned in the preceding clause. It is true that the plural "trusts" is used. That may have been from the inadvertence of the scrivener, or because he had in mind the four houses and lots, or the various matters to which the money realized by mortgage was to be devoted. But it is clear that the "trusts" referred to related to real estate of which the testator had not disposed of the fee, and the real estate mentioned in the preceding clause was the only real estate of which he had not disposed of the fee. Therefore, the words "upon the termination of the real estate trusts" can have no meaning or effect attributed to them, as the trust attempted to be created had no term, no beginning or end, and the devise of the real estate took effect at once upon the testator's death as a vested remainder subject to the life estate previously given to his wife.

The only remaining difficulty of a serious nature which we encounter in the construction of these clauses is to determine who were meant by "the legatees." The devise was to "each and every of my legatees herein named, except Ann Davey and Hugh Collins, to be divided between such legatees in the proportion in which his, her or their specific legacies hereinbefore named and bequeathed bear to each other." Strictly speaking there were no legatees mentioned in the previous clauses of the will except his wife. She was the only person to whom personal property was bequeathed. All the other beneficiaries were given either real estate or the

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income of real estate through the hands of trustees. The word "legatees," as used here, cannot, therefore, have its strict legal significance as one who takes personalty under a will and it was not intended that it should. It was clearly meant to include persons to whom real estate, or the income of real estate had been given, and this is made evident from the fact that Ann Davey and Hugh Collins, who were devisees of real estate, were excluded from the persons who were called legatees. The inference is that, but for the exception, the testator supposed they would be included in the term "legatees." It is not believed that he intended to include his wife among those whom he called "legatees." He was a very old man at the time of his death, passed eighty years, and when he made his will could not have expected to live long, or that his aged wife, also past eighty, would long survive him. He had given to her real estate in fee valued at over \$200,000, besides a large amount of personal property, and the income and profits of the four houses on Fifth avenue. He had made liberal provisions for several of her relatives, and it is not probable, if he intended to make further provision for her, that he would have included her with others under the general designation of "legatees." The legatees mentioned in the twenty-fifth clause are clearly the same persons intended to be described by the term legatees in the twenty-fourth clause, and there it is quite clear that the wife was not intended as one of the legatees, because the distribution and payment there directed to be made might be postponed ten years and was probably intended to be postponed until after her death.

There is also a reasonable probability that he did not intend to embrace among the legatees the devisees who took the real estate in remainder, after the termination of the seventeen trusts. In several of the clauses, the wives of the beneficiaries are named as devisees in remainder; in several, the devisees are the issue of the heirs of the beneficiaries, and in several, it is provided that the issue of any one of the deceased heirs of a remainderman shall take the share the

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parent would have taken if living. It is not reasonable to suppose that the testator meant to include among the legatees only the wives and issue of life beneficiaries specially named, and not all the remaindermen specially designated, although not specially named, including the unborn issue and heirs of life beneficiaries. If the word "legatees" is to have the broad signification claimed, then it would be impossible during the life of any beneficiary to ascertain who the legatees are, and therefore impossible to uphold the devise in the twenty-fifth clause. If such a construction would not render the clause invalid for any other reason, it would render it so impractical and indefinite that the land could not be divided and distributed under it. It is clear that the word "legatees" used in the twenty-fourth clause was not intended to embrace the unborn issue or heirs of any life beneficiary, because the distribution and payment there directed was to be made at any time within ten years after the death of the testator, and as the same word in the twenty-fifth clause is to have the same meaning, it cannot be held to embrace the unborn heirs of a life beneficiary, and, as before said, unless it can be held to embrace all of the remaindermen, it can embrace none of them. This scheme of division and distribution attributed to the testator by the appellants is so extraordinary, impractical and embarrassing that it should not be taken to embody the testator's intention.

Who, then, was meant by the word "legatees?" We think that it is reasonably probable that the testator meant the life beneficiaries and Parschall. The fact that he excepts Hugh Collins and Ann Davey, who are devisees in fee, shows that Parschall who was a devisee in fee was meant to be included among the legatees. The value of the real estate devised to him is but \$1,800, and his proportion, therefore, will be quite small. The life beneficiaries were prominently in the testator's mind, and from their relationship to him or to his wife were the conspicuous objects of his bounty. They were selected as heads of families for whom he meant to provide, giving them the income of the property during life, and then

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giving the property in which they had a life interest to their widows, issue and heirs. As the property was thus disposed of after their use of it would be terminated by death, he evidently regarded it as if they were the real and only objects of his benefaction, and the provision for the remaindermen was on their account. This conclusion is fortified by a consideration of the last two paragraphs of the twenty-fifth clause. Did he mean by "the heirs of such legatees as may have died" the heirs of a remote remainderman, who might be wholly unknown to him? He clearly meant the heirs of a legatee known to him and then in his mind. When he said he meant to regard each of his legatees "as a legal heir" of the real estate mentioned, he probably had in mind some definite persons well known, whom he meant to bring into the intimate relation with him and his estate of heirship.

We think these are reasonable views to take of the testator's scheme, and they will render the twenty-fifth clause practical and valid; and we are, therefore, not without some hesitation and difficulty, brought to the conclusion that the court below was right in holding that the eighteen persons named, to wit, the seventeen life beneficiaries and Parschall, were the sole devisees under the twenty-fifth clause of the will.

The next difficulty to be encountered pertains to the method or basis for the division of the real estate between these devisees. It was to be divided in "the proportion in which his, her or their specific legacies hereinbefore named or bequeathed bear to each other." The words, "specific legacies," have reference, evidently, to the specific real estate provided for each of the beneficiaries and their wives, heirs and issue. That is in each case specific. There is no difficulty in ascertaining what proportion each share of the real estate bears to all the real estate devised. The real estate provided for each beneficiary, and after him for his family, is spoken of as his, and it is on the basis of the value of that real estate that his proportion of this real estate is to be ascertained, and that is the way in which it is directed to be divided by the judgment of the court below; and in that

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we concur. Any other basis for a division would be impractical, and should not, therefore, be adopted.

It must be conceded that much may be said against any construction which the courts could give to the twenty-fifth clause; but, on the whole, we think that the construction we have thus given has the most reasons to sustain it, and probably accords with the intention of the testator.

We have, therefore, concluded that the order appealed from is right and should be affirmed, without costs to any of the parties.

All concur except ANDREWS, J., not voting.

Order affirmed.

JOHN B. KUNZ, as Administrator, etc., Appellant, v. THE CITY OF TROY, Respondent.

The duty of keeping the streets of the city of Troy in repair and free from obstructions is, under its charter, a corporate duty. (§ 15, chap. 181, Laws of 1816; § 2, tit. 2, chap. 598, Laws of 1870.)

The city was not relieved from the duty so imposed by the creation of the board of police commissioners under and by the act of 1870 (chap. 520, Laws of 1870); even assuming that board as so constituted is an independent body, not subject to the control of the municipal corporation. The powers conferred and duties enjoined upon the police department by said act in respect to the streets are auxiliary only, not exclusive.

To charge a city corporation with negligence, in not removing an obstruction unlawfully placed in one of its streets by a third person, it is not necessary to show express notice; if it appears from the circumstances that the municipal authorities charged with the care of its public streets ought to have known of the obstruction and to have caused its removal, and, if ignorant, that their ignorance resulted from the omission of the duty of inspection, and of the degree of diligence which might reasonably be expected, the city is equally chargeable as if express notice had been actually given.

It seems that where the question of negligence in not removing such an obstruction depends upon implied notice, in determining what is a reasonable time from which notice is to be inferred, weight should be given to the consideration that municipal authorities cannot be expected to act with the promptness and celerity of individuals in conducting their private affairs.

104	344
109	306
104	344
115	109
104	344
119	153
104	344
139	494

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In an action for negligence causing injury to a child, so young as to be *non sui juris*, contributory negligence may not be imputed to the child; and so it is not sufficient to defeat a recovery to show that the injury would not have happened without the concurring act of the child, although if committed by an adult it would be a negligent one. There must also be concurring negligence on the part of the parents or guardian.

It is not *per se* negligence on the part of a parent or guardian to permit a child *non sui juris* to play in the street.

In an action against the city of Troy to recover damages for alleged negligence causing the death, of G., plaintiff's intestate, it appeared that one McL. placed a large heavy counter on the sidewalk of a frequented street in a busy part of the city, tilted in such a manner as to be easily thrown down. Four days afterward, G., a child between five and six years, was playing around the counter with two other children of about the same age, when the counter was thrown down by the children running against or jumping upon it, it fell upon G., inflicting injuries which caused his death. There was evidence tending to show that G's father went into a store near by, leaving G. at the door, cautioning him not to go far away; the father returned in from two to five minutes, and during that time the accident happened. By a city ordinance the placing of obstructions on the streets, except when done under a license, is prohibited, and certain of the city officials named are authorized to order any obstructions to be removed. *Held*, that the court erred in directing a non-suit.

Kunz v. City of Troy (36 Hun, 615) reversed.

(Argued January 19, 1887; decided February 1, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 17, 1885, which affirmed a judgment in favor of defendant, entered upon an order non-suiting the plaintiff on trial. (Reported below 36 Hun, 615.)

This action was brought to recover damages for alleged negligence causing the death of George W. Kunz, plaintiff's intestate.

The deceased was at the time of his death between five and six years of age. He had been accustomed to accompany his father, the plaintiff, who was in the employ of a man having a store on Federal street in the city of Troy, to his place of business; near to this store was a saloon kept by one McLaughlin. On Tuesday, April 19, 1881, McLaughlin

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removed from the saloon certain bar fixtures which were placed upon the sidewalk, among them a sideboard which was placed back against the wall of the building and in front of this, and tilted back against it, a bar counter eighteen to twenty feet long, and from two and one-half to three feet high with a heavy top of black walnut about thirty inches wide; the counter at the bottom was about two feet wide. On Saturday, April twenty-third, plaintiff was standing in the door of his place of business, with his son near him on the sidewalk, when some person requested him to change a bill, he stepped back into the store for that purpose, telling his son not to go far away. He was absent from two to five minutes. On his return he found his son seriously injured, and from the effects of the injury he died. The evidence tended to show that the boy was playing around the counter with two other children of about his own age, when in consequence of their running against or jumping upon it, the counter was thrown down falling upon the deceased and inflicting the injuries.

Further facts appear in the opinion.

Edgar L. Fursman for appellant. The defendant was bound to the exercise of a reasonably active vigilance to ascertain the existence of the obstruction upon the sidewalk and cause its removal. (*Todd v. City of Troy*, 61 N. Y. 506, 509.) The plaintiff is entitled to the most favorable inferences deducible from the evidence, and all contested questions of fact are to be deemed established in his favor. (*Rehberg v. Mayor, etc.*, 91 N. Y. 137, 141.) The very fact of the obstruction being placed in the street by a private person, without permission of the city authorities, and in direct violation of a city ordinance, called upon the city authorities to take notice of its existence and situation upon the sidewalk and of the dangerous manner in which it stood, and to cause its removal. (91 N. Y. 137; *Hume v. Mayor, etc.*, 74 id. 264.) The plaintiff's intestate was not negligent. It is hardly possible to impute negligence to a child of five years. (*McGarry v. Loomis*, 65 N. Y. 104-108; *McGuire v.*

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Spence, 91 id. 303; *R. R. Co. v Stout*, 17 Wall, 657; *Pittsburg, etc., R. Co. v Caldwell*, 74 Penn. 421; *Maibus v. Dodge*, 38 Wis. 300; 28 Am. R. 6-8; *Thurber v. H. B. M. & F. R. R. Co.*, 60 N. Y. 326; *Ihl v. Forty-second St. R. R. Co.*, 47 id. 317; *Mangam v. Brooklyn R. R. Co.*, 38 id. 455.) There was no negligence on the part of the father imputable to the child. (*Mullaney v. Spence*, 15 Abb. [N. S.] 319; *Cosgrove v. Ogden*, 49 N. Y. 255; *Fetter v. N. Y. & H. R. R. Co.*, 2 Abb. App. Dec. 458; *Powell v. Powell*, 74 N. Y. 71; *Hart v. Bridge Co.*, 80 id. 622.) The nonsuit was erroneous unless it can be said that the defendant was not liable in any aspect of the case. (36 Hun, 315; *Hartfeld v. Roper*, 21 Wend. 615.) In cases of this character there is no difference, so far as liability is concerned, between active negligence and passive negligence. (*Weed v. Village of Ballston Spa*, 76 N. Y. 329, 336; *Birge v. Gardiner*, 19 Conn. 506; *Lynch v. Nurdin*, 41 Eng. C. L. 422; *Lane v. Atlantic Works*, 111 Mass. 136, 139, 140; *Norristown v. Moyer*, 67 Penn. 355; *Champlin v. Penn Yan*, 34 Hun, 33; *Hume v. Mayor, etc.*, 74 N. Y. 264, 270; *Rehberg v. Mayor, etc.*, 91 id. 137.) It is of no consequence that the city authorities, if they knew of the existence of the obstruction, did not think it dangerous if it was in fact dangerous; that was a question of fact for the jury. (*Goodfellow v. Mayor, etc.*, 100 N. Y. 15, 18.)

R. A. Parmenter for respondent. There was not sufficient evidence for the jury to predicate negligence on the part of the defendant. (*McKay v. Buffalo*, 9 Hun, 401; *Dillon on Mun. Cor.*, § 773; *Lorillard v. Town of Monroe*, 11 N. Y. 392.

ANDREWS, J. We think the case should have been submitted to the jury. The duty to keep the streets in the city of Troy in repair and free from obstructions is a corporate duty resting upon the municipality, springing from the acceptance by the city of its charter and the power of the municipal legislative body to protect the streets against nuisances, to the injury of the public right or of individuals lawfully using them.

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The charter (Laws of 1816, chap. 131, § 15), makes the common council commissioners of highways within the city, and it is empowered to pass ordinances to regulate and keep in repair the streets in the city and to prevent incumbrances thereon, and it is made the duty of the mayor to cause the laws and ordinances of the city to be duly executed (Laws of 1870, chap. 598, tit. 2, § 2). By an ordinance passed in 1859, the placing of any obstructions upon any of the streets or sidewalks, interfering with the free use thereof, except when done under a license for the erection or repairing of buildings, is prohibited, and by another ordinance, passed the same year, the mayor, members of the common council and other officers mentioned were authorized to order any obstructions placed in the streets to be removed. The city was not relieved from the duty under the charter to keep the streets free from obstructions by the creation of the board of police commissioners, first established by chapter 520, of the Laws of 1870, and the duty imposed upon the police force by the twenty-third section of the act to remove nuisances from the public streets, assuming, as is claimed, that the board of police commissioners, as constituted, is an independent body, not subject to the control of the municipal corporation, or amenable to its jurisdiction. It is sufficient for the purposes of this case to say that the powers conferred and the duties enjoined upon the police department by the act of 1870, in respect to the streets, are auxiliary only, and not exclusive. (*Conrad v. Village of Ithaca*, 16 N. Y. 158; *Todd v. City of Troy*, 61 id. 506.) The negligence, if any, on the part of the city in the present case, does not arise from any affirmative act, but from an alleged omission to exercise proper care and supervision, and permitting the counter, unlawfully placed on the sidewalk by McLaughlin, to remain there after notice of the obstruction. The death of the plaintiff's intestate, caused by the falling of the counter, demonstrates that it was a dangerous obstruction on the sidewalk. It is quite probable that it would not have fallen without the agency and contact of the children who were playing about it. But such an interference might

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reasonably have been anticipated, and to place a large object, as the counter was, on a sidewalk on a frequented street, tilted in such a manner that it could be thrown down by two or three children of five or six years of age running against or climbing upon it, was plainly an unlawful and negligent act.

The city, however, was not responsible for the original wrong. Its culpability, if any, as we have said, consists in not interfering to cause the removal of the obstruction after due notice of its existence. It is not claimed that there was any actual notice of the obstruction to the mayor, or the legislative body, or any city official, unless notice to patrolmen was notice to the city. It is denied that notice to members of the police force was notice to the city, for the reason before indicated. But aside from the fact that the obstruction was observed by patrolmen, the counter was placed on the sidewalk on Tuesday, and remained there until Saturday, the day of the accident, and it is not claimed that meanwhile any measures were taken by the authorities to have the obstruction removed. This lapse of time, together with the fact that Federal street was in a busy and frequented part of the city, made it, we think, under the authorities, a question for the jury, whether the city authorities, charged with the care of the public streets, ought to have known of the obstruction and to have caused its removal before the accident. If the city authorities had no actual notice, nevertheless, if their ignorance was owing to an omission of the duty of inspection, and of the degree of diligence which might reasonably be expected under all the circumstances, the opportunity of knowledge stands, for the purposes of the case, as actual knowledge and the city is equally chargeable as if express notice had been actually proven. (*Weed v. Village of Ballston Spa*, 76 N. Y. 329, and cases cited.) It is obvious that this rule, unless carefully administered by courts and juries, may impose unjustifiable burdens upon municipal corporations. The rule requiring care on the part of municipalities in protecting and keeping safe the public streets, and which subjects such corporations to the consequences of a disregard of their statutory duties in

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this respect, is wholesome and founded, we think, in just principles. The danger is that courts and juries may not sufficiently take into account, in determining the question of negligence, the extent of roadways in a city, under the supervision of the city authorities, the unavoidable delay often attending the action of municipal authorities, and financial and other embarrassments. Where the question of negligence, in not removing an obstruction unlawfully placed in the street by third persons, depends upon implied notice, what is a reasonable time from which notice is to be inferred, must be determined upon all the circumstances, giving weight to the consideration that municipal authorities with their multiplied duties cannot be expected to act with the promptness and celerity of individuals in conducting their private affairs.

The remaining question relates to the alleged negligence of the plaintiff's intestate. The intestate was a child between five and six years of age. We understand the rule to be that in an action for an injury founded on negligence, contributory personal negligence cannot be attributed to a child of very tender years, who from his age cannot be supposed capable of exercising judgment or discretion, although the injury would not have happened without his concurring act, and although that act if committed by an adult would be a negligent one. In such a case a defendant whose negligence was a constituent element of the transaction, and without which the injury would not have happened, is legally responsible, notwithstanding the negligence of the infant, unless it appears that the parents or guardians were negligent in permitting the child to be brought into the situation which subjected it to the hazard and resulting injury. There is an obligation in general upon all persons to conduct themselves with prudence and care, and not recklessly, or even incautiously expose themselves to danger, even from the negligent acts of others. But the law exacts no impossibility. It does not require an infant before reaching the age of discretion to exercise discretion. But it imposes upon

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parents and guardians the duty of using reasonable care to protect those incapable of protecting themselves, and if they fail to exercise such care, and the infant is thereby brought into danger and suffers injury from the negligent act of another, their negligence is deemed the negligence of the infant. In *Hartfield v. Roper* (21 Wend. 615), it was held as matter of fact that there was no negligence on the part of the defendant, and that that there was negligence on the part of the parents in permitting a child of two and a half years of age to be in the roadway. The new trial in that case was properly granted on either ground. There are some remarks in the opinion which, disconnected with the context, may be construed as sustaining the proposition that although there was no negligence on the part of the parents, the plaintiff could not maintain the action if the conduct of the child contributed to the injury. But we understand the present doctrine on this question to be that it is not sufficient to defeat a recovery for an injury to a child, not *sui juris*, caused by the negligence of a defendant, that the act of the child was one which in an adult would be deemed a negligent one contributing to the injury. There must also be concurring negligence on the part of the parents or guardians. (*Ihl v. Forty-second St. R. R. Co.*, 47 N. Y. 317; *McGarry v. Loomis*, 63 id. 104.) In the absence of negligence on the part of the parents or guardian, the doctrine of contributory negligence has, in such a case, no application.

In this case the child, in playing about the counter, was indulging a natural instinct in amusing himself and was not guilty of legal negligence, "although he contributed to the mischief by his own act." (Lord DENMAN in *Lynch v. Nurdin*, 1 Adolph & El. [N. S.] 29.) The law does not define when a child becomes *sui juris*. If there was any question whether the plaintiff's intestate had sufficient discretion to understand the danger of the situation, it should have been left to the jury, with proper instructions as to the degree of care exacted of a child of tender years, under the circumstances. (*Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 455; *McGovern v. N. Y.*

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C. & H. R. R. Co., 67 id. 418; *Byrne v. Same*, 83 id. 620; *Dowling v. Same*, 90 id. 670; *R. R. Co. v. Stout*, 17 Wall. 657.) It is insisted, however, that the father of the intestate was chargeable with negligence in permitting the child to be on the sidewalk unattended. It has been held that it is not *per se* wrongful or negligent to permit children to play in the street. (*McGarry v. Loomis*, *supra*; *McGuire v. Spence*, 91 N. Y. 303.) It may, or may not, be negligence, depending upon circumstances. It was, we think, for the jury to determine whether the father of the intestate was guilty of negligence. The plaintiff is entitled to the most favorable inferences deducible from the evidence, and in reviewing the nonsuit all contested questions of fact are to be deemed established in his favor. The jury would have been entitled to have found from the evidence that the father left the child at the door of the store to go into the store to make change, cautioning the boy not to go far away, and on his return, from two to five minutes later, the accident had happened. It would be, we think, too strict a rule to impute negligence to the father as matter of law, under such circumstances. (See *Cosgrove v. Ogden*, 49 N. Y. 255.)

We think the court erred in directing a nonsuit, and that the judgment should be reversed and a new trial granted.

All concur.

Judgment reversed.

104	352
111	228
104	352
148	98
104	352
151	208

MARY J. MCKINNEY, an infant, etc., Respondent, v. THE
GRAND STREET, PROSPECT PARK AND FLATBUSH RAILROAD,
Appellant.

Where the statutory prohibition (Code of Civ. Pro., § 834) against the disclosure by a physician of information acquired by him while attending a patient in his professional capacity, has been expressly waived by the patient, and the waiver acted upon, it cannot be recalled; the information is then open to the consideration of the entire public, and the patient is not privileged to forbid its repetition.

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Accordingly, *held*, where upon the trial of an action against a railroad corporation, to recover damages for injuries to plaintiff caused by negligence, a physician, who, as such, attended upon the plaintiff after the injury, was called as a witness in her behalf, and testified as to all the facts bearing upon her physical condition, learned by him while so attending upon her, that upon a subsequent trial the defendant was entitled to call and examine him as a witness in regard to such facts.

(Argued January 21, 1887; decided February 8, 1887.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made February 10, 1885, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

This action was brought to recover damages for personal injuries alleged to have been caused by defendant's negligence.

A car on defendant's road ran off on a switch track, and collided with another car going in the opposite direction, thus occasioning the injuries complained of.

The facts material to the questions discussed are stated in the opinion.

Samuel D. Morris for appellant. The court erred in excluding the testimony of the physicians called on behalf of defendant; they having been examined on the former trial on plaintiff's behalf, she thereby waived any statutory right to object to their disclosing the knowledge they had acquired by examining her. (*Pierson v. People*, 79 N. Y. 433; *Edington v. A. L. Ins. Co.*, 77 id. 569.)

Anthony Barrett for respondent. The testimony of the physician who treated and prescribed for plaintiff was properly excluded under section 834 of the Code. (*Dilleber v. Home L. Ins. Co.*, 69 N. Y. 256; *Cohen v. Cont. L. Ins. Co.*, id. 300; *Grattan v. Met. L. Ins. Co.*, 92 id. 274.) The fact that plaintiff called some of the excluded physicians as witnesses on the first trial does not constitute a waiver of her privilege on this trial. (2 Black. Comm. 389.)

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within the reason of the statute prohibiting the sale of lands held adversely, and was not therefore within its prohibition.

In *Dewitt v. Barley* (9 N. Y. 371) the principle embodied in the maxim was applied to modify the rule excluding the opinions of witnesses as evidence, and it may be said that it is applicable to every case where the sole reason for a rule has entirely ceased to exist.

The judgments of the courts below should be reversed and a new trial granted, with costs to abide the event.

All concur, except DANFORTH, J., dissenting.

Judgment reversed.

104 356
106 562

ELLEN TILYOU, Appellant, v. THE TOWN OF GRAVESEND et al.,
Respondents.

In 1871 the electors of the town of Gravesend passed a resolution, to the effect that the common lands of the town on Coney Island should thereafter be let only by auction to the highest bidder, and prohibited the letting of any lot at a time more than one year prior to the expiration of any existing lease. The same restriction was contained in a resolution passed in 1866, before the system of public lettings was adopted. In 1878 a resolution was adopted, amending that of 1871, by adding a provision authorizing the commissioners to renew any existing lease upon terms they may deem most advantageous to the town. *Held*, that this did not authorize the commissioners to renew leases without restriction as to the time when the power should be exercised; but, that it was subject to the restriction contained in the resolution of 1871; and that a renewal lease, executed more than a year prior to the expiration of an existing lease of the lot, was void.

(Argued January 21, 1887; decided February 8, 1887.)

APPEAL from order of the General Term of the Supreme Court, in the second judicial department, entered upon an order made December 9, 1884, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term.

This action was brought by plaintiff to have a renewal lease executed to her by the commissioners of common lands of

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the town of Gravesend, of certain lots owned by the town, situate on Coney Island, and part of what is known as the common lands of the town, declared to be valid, and restraining the town and its officers from accepting bids for the fee of the lot.

The court found, among other things, the following:

"On April 3, 1866, the electors of said town, in town meeting assembled, passed a resolution providing, among other things, concerning said common lands, that the commissioners of common lands should have no power to grant leases, or agree to grant a lease of any such lands, until within one year of the expiration of any existing lease thereon, and for terms not exceeding ten years; on April 4, 1871, such electors in like town meeting, passed a resolution, among other things, that such lands must be let only by public auction, by said commissioners for terms not exceeding ten years; and that no lot should be let at a time more than one year prior to the expiration of any lease thereon; and on April 2, 1878, such electors, in like meeting, passed a resolution that said resolution, passed in 1871, be amended by adding thereto that such commissioners are authorized to renew any existing lease on any of said lands upon such terms as they may deem most advantageous to said town.

On November 12, 1872, the then commissioners of common lands did, after conformity to said resolutions of 1866 and 1871, by instrument in writing, lease said lots twenty-four and twenty-seven, respectively, to Francis Swift at the rent of \$70 and \$230, respectively, per annum, for a term of ten years, respectively, from November 12, 1872, and said Swift entered into possession thereof, and subsequently assigned said leases to plaintiff, who entered into possession.

On March 1, 1880, the then three commissioners of common lands, without any public notice, auction, or competition, did sign and execute to said plaintiff an instrument in writing, which, in terms, purports to be a lease by said town, through said commissioners to plaintiff, of said lots twenty-four and twenty-seven for a term of ten years, from

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November 12, 1882, at rentals of \$75 and \$235, respectively, per annum, and plaintiff now claims to hold possession of said lots under said new leases."

Further facts appear in the opinion.

Edward S. Rapallo for appellant. The town of Gravesend is seized and possessed of its common lands as a body corporate and not as a body politic. The commissioners of common lands are its agents to transact specific corporate business; and are in no sense political officers. (*Denton v. Jackson*, 2 Johns. Ch. 320; *North Hempstead v. Hempstead*, 2 Wend. 134; *People v. N. Y. & M. B. R. R. Co.*, 84 N. Y. 568.) The resolutions, properly construed, authorized the commissioners, without public notice, auction or competition, at the time of the renewal, to grant to the plaintiff a renewal of her leases for ten years. (Wood's History of L. I., 3, 4, 10, 13, 15, 18, 28, 74, 87; 2 Greenl. 166, 167; 1 Kent & Radc. 331, § 11; 2 R. L. 131, § 12; 1 R. S. 337; 5 Stat. at Large [Edmunds' ed.] 524.) The resolution of 1871 confers the power to make new leases. It also authorizes the renewal of existing ones. (2 Bouv. 27; *Le Roy v. Beard*, 8 How. 468.) The resolution also contained the terms upon which leases might be made and renewed. (*Le Roy v. Beard*, 8 How. 464; *Howard v. Baillie*, 2 H. Bl. 618; Story on Agency, 58; *Jeffreys v. Bigelow*, 13 Wend. 527; *Overseers of Hamilton v. Overseers of Eaton*, 6 Cow. 358; *Rogers v. Kneeland*, 10 Wend. 252.) The resolution does not alter the power of the commissioners as to the terms of renewals. (*Hunt v. Whitsett*, 4 Col. 84, 90; *Hutchinson v. Lord*, 1 Wis. 314; 2 Burr. Tit. Terms; Abb. Law Dict. Tit. Terms.) The general tenor of the two resolutions is in favor of what was done, and the manner of its execution; and the evident intention of the town being preserved, no violence is done to the legal force of the resolutions, even though objection may be taken to the construction of particular words. (*Le Roy v. Beard*, 8 How. 468; *Vanada v. Hopkins*, 1 Marsh. 287.) The agents did what seemed from the resolutions plausible

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and correct, and even though it should now turn out to be wrong, as intended by the principal, the latter is still bound. (*Le Roy v. Beard*, 8 How. 468; *Lomas v. Cartwright*, 3 Wash. C. C. 151; *Andrews v. Kneeland*, 6 Cow. 358.) The person who deals with the agent is required, like him, to look to the instrument to see the extent of the power, and if it be ambiguous so as to mislead them both, the injurious consequences should fall on the principal for not employing clearer terms. (7 B. & Cres. 278; 1 Peters, 290; *Baring v. Corrie*, 2 B. & Ald. 143; *Courcier v. Ritter*, 4 Wash. C. C. 551; *Sandford v. Handy*, 23 Wend. 268.)

William J. Gaynor for respondents. A repealing, or subsequent conflicting statute does not change or affect the prior act, except in so far as it expressly changes it or is irreconcilably repugnant to it. (Sedgwick on Constr. of Stat. [2d ed.] 97, 98, 102, 106; *People v. Palmer*, 52 N. Y. 83; *Hawkins v. Mayor, etc.*, 64 id. 18.) Persons dealing with public agents or officers are bound to take notice of their powers, and inquire into the extent thereof, and the manner in which the same must be executed. (Dillon on Munic. Corp. [3d ed.] §§ 445, 447; *Parsel v. Barnes*, 25 Ark. 261; *Smith v. City of Newburgh*, 77 N. Y. 130; *McDonald v. Mayor, etc.*, 68 id. 23; *Ford v. Mayor, etc.*, 63 id. 940; *Supervisors v. Bates*, 17 id. 242-246; *Delafield, v. State of Ill.*, 2 Hill, 159-174.)

ANDREWS, J. This seems to be a reasonably plain case. The question is whether the commissioners of common lands in the town of Gravesend, in granting to plaintiff on March 1, 1880, a renewal of the lease of lots twenty-four and twenty-seven of the common lands of the town, for a term of ten years from November 12, 1882, the date of the expiration of the term of the lease under which she then held the premises, were acting within their authority. The determination of the question depends upon the construction of two resolutions passed by the electors of the town, in town meeting assembled,

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one April 4, 1871, and the other April 2, 1878. The only authority possessed by the commissioners was conferred by those resolutions. The precise point in controversy is whether the commissioners were authorized to renew an existing lease for a term to commence on the expiration of the prior lease, before the commencement of the last year of the unexpired lease.

The resolution of April 4, 1871, so far as it is material here, is as follows: "*Resolved*, That the common lands of the town of Gravesend, on Coney Island, shall hereafter be let only at public auction on the premises to be let, or at the town house in this town, to the highest bidder, in parcels of not more than three hundred feet front each (except Coney Island Point, which may be let in one parcel as at present) on notice specifying the time and place of letting, and describing the premises to be let, which said notice shall be published in the Brooklyn Daily Eagle and Union each, once in each week, for four weeks immediately prior to such letting. No lot shall be let at a time more than one year prior to the expiration of any existing lease thereon, and no lot let for a longer period than ten years." The language quoted, is followed by a provision for compensation for improvements, to be made by the incoming to the outgoing tenant, when any lot previously under lease, is let to a person other than the former lessee, as to which provision, no question arises in this case. The resolution of April 2, 1878, is as follows: "*Resolved*, That the resolution in relation to leasing common lands in the town of Gravesend, passed at a town meeting held in the town of Gravesend, April 4, 1871, be amended by adding thereto the following: 'The commissioners of common lands are also authorized to renew any existing lease or leases of common lands belonging to said town of Gravesend, upon terms as they may deem most advantageous for said town.'"

It is claimed on the part of the appellant that the resolution of April 2, 1878, conferred authority on the commissioners to renew leases, without limitation as to the time when the power should be exercised, and that this power was not sub-

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ject to the restriction contained in the resolution of April 4, 1871, that "no lot shall be let at a time more than one year prior to the expiration of any existing lease thereon." We cannot assent to this construction of the resolution of 1878. Under the resolution of 1871, no lease could be granted except upon competitive bidding at public auction. The commissioners had no power to renew existing leases. In all cases the right to a lease of any town lands, whether held under an existing lease or not, vested in the highest bidder at the public letting. The prior lessee acquired no preference, and he could demand a new lease only in the character of purchaser of the right at the public sale. Unless he was the highest bidder, his interest terminated with his existing lease, subject only to the right to compensation for improvements, as provided in the resolution. It is quite manifest that under the resolution of 1871, a lessee who had made valuable improvements during his term, or had built up a valuable business in connection with the premises, might at a re-letting at public auction be placed at a disadvantage. The town authorities also were deprived of any discretion, and although, in view of the circumstances, they might think it for the best interest of the town to continue the existing tenancy, they could not elect to do so, nor could they give any effect to equitable considerations. It was, we think, the object of the resolution of 1878, to relax the stringent rule prescribed in the resolution of 1871, as applied to common lands held under lease, by taking them out of the general rule requiring a public letting, and permitting the commissioners to renew existing leases upon such terms as might be agreed upon between themselves and the tenants in possession. But the resolution of 1878 in no other respect interfered with the scheme of the resolution of 1871. It left unaffected the provision in the resolution of 1871, that "no lot shall be let at a time more than one year prior to the expiration of any existing lease thereon, and no lot for a longer period than ten years." It is obvious that these restrictions were imposed in view of the contingency of an

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advance in the value of the town property on Coney Island, and to secure to the town an adequate rental. The amendment of 1878, did not abrogate these restrictions. They, in fact, served a more important purpose than before, and operated as a check upon fraudulent and collusive proceedings on the part of the town commissioners. These restrictions, moreover, did not have their origin in the resolution of 1871. They are found in the resolution of 1866, passed before the system of public lettings was adopted, and the resolution of 1878, which restored to the commissioners the power to renew leases which they possessed under the resolution of 1866, contains no indication that it was the intention to depart from the policy established in 1866, and continued by the resolution of 1871, as to the time within which the power to make renewals should be exercised. The general rules of construction sustain, we think, the construction put by the courts below upon the resolution of 1878, and it follows that the judgment declaring the lease in question to be void, should be affirmed.

All concur.

Judgment affirmed.

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111	327
104	362
123	508
123	649
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MARY BYRNE, an infant, etc., Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Where the public for a long period of time have notoriously and constantly been in the habit of crossing a railroad at a point not in a traveled public highway, with the acquiescence of the railroad corporation, this acquiescence amounts to a license, and imposes a duty upon it, as to all persons so crossing, to exercise reasonable care in the running of its trains, so as to protect them from injury.

Although not absolutely bound to ring a bell or blow a whistle upon the locomotive of a train, approaching suc' a crossing, the company is bound to give some notice and warning, and as to what is sufficient is a question of fact for a jury.

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Where a train is backing toward the crossing, the fact that the bell was rung does not, as matter of law, establish reasonable care; it is for the jury to determine as to whether any other precautions should have been taken upon the train, under the circumstances.

Nicholson v. E. R. Co. (41 N. Y. 525); *Sutton v. N. Y. C. R. R. Co.* (66 id. 243); *Larmore v. C. P. I. Co.* (101 id. 391); distinguished.

(Argued January 21, 1887; decided February 8, 1887.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made June 27, 1885, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

This action was brought to recover damages for personal injuries, alleged to have been caused by defendant's negligence. Plaintiff was crossing the tracks of defendant's road when she was struck by the rear car of a backing train and was injured.

This is the third time the case has been before this court. A *mem.* of the first decision may be found in 83 New York, 620; it is reported on the second appeal in 94 New York, 12.

The facts, so far as material to the questions discussed, appear in the opinion.

Esek Cowen for appellant. Plaintiff, although an infant eleven years of age, was not excused from the duty of using her eyes and ears for her own protection. (*Reynolds v. N. Y. C. R. R. Co.*, 58 N. Y. 248; 83 id. 620.) The court erred in charging that the company was bound to give, by bell, whistle, or otherwise, such notice of the approach of this train as the jury should find reasonable. (*Hennsell v. Smyth*, 97 E. C. L. 731; *Barry v. N. Y. C. & H. R. R. R. Co.*, 92 N. Y. 289; *Nicholson v. E. R. Co.*, 41 id. 525; *Sutton v. N. Y. C. & H. R. R. R. Co.*, 66 id. 243, 248.) The true question was whether the train was managed with such care and caution as the circumstances demanded; and to charge the jury that the company was bound to give notice, or use any other specified precaution not required by statute, was error. (*Semel v. N. Y., N. H. & H. R. R. Co.*, 9 Daly, 321;

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Beisiegel v. N. Y. C. R. R. Co., 40 N. Y. 9; *Crippen v. N. Y. C. & H. R. R. R. Co.*, id. 34.)

R. A. Parmenter for respondent. On the evidence, the question of the plaintiff's contributory negligence was plainly one of fact for the jury. (14 Hun, 322; 83 N. Y. 620.) The manner in which the crossing at the place of the injury had been used by the public, amounted to a dedication. (*Barry v. N. Y. C. & H. R. R. R. Co.*, 92 N. Y. 293.) The neglect to ring the bell was sufficient evidence of negligence on the part of the railroad company. (3 R. S. [Edm. ed.] 643, § 7; *Ernst v. H. R. R. R. Co.*, 35 N. Y. 9; *Maginnis v. N. Y. C. & H. R. R. R. Co.*, 52 id. 215; *Webber v. Same*, 58 id. 451; *Salter v. Utica & B. R. R. R. Co.*, 59 id. 631; *Culhane v. N. Y. C., etc., R. R. Co.*, 60 id. 137; *Massoth v. D. & H. C. Co.*, 64 id. 524; *Cordell v. N. Y. C., etc., R. R. Co.*, id. 535; *Haycroft v. L. S. & M. S. R. Co.*, id. 636.) There is greater necessity for ringing the bell when the train is being backed over streets in a populous city, and the requirement to ring the bell in such cases is equally mandatory. (*Casey v. N. Y. C. & H. R. R. R. Co.*, 64 N. Y. 636.) The question of the alleged contributory negligence on the part of the plaintiff was also one of fact for the jury. (*Hill v. N. Y. C., etc., R. R. Co.*, 2 Week. Dig. 94; *Morrison v. N. Y. C., etc., R. R. Co.*, 63 N. Y. 643; *O'Mara v. N. Y. C. & H. R. R. R. Co.*, 38 id. 445; *Sheehy v. Berger*, 62 id. 558; *Dickens v. N. Y. C. R. R. Co.*, 1 Keyes, 23; *Hart v. H. R. Bridge Co.*, 9 Week. Dig. 536; 80 N. Y. 622.) The parents of the plaintiff are not shown to have been guilty of negligence or imprudence in permitting a girl between ten and eleven years of age to travel alone in the street and to pass over railroad crossings. (*Ihl v. Forty-second St. R. R. Co.*, 47 N. Y. 317; *McGarry v. Loomis*, 63 id. 107.) The true rule as to the degree of care and prudence exacted in this class of cases of a child between ten and eleven years of age, required this case to have been submitted to the jury. (*O'Mara v. H. R. R. Co.*, 38 N. Y. 440; *Sheridan v. B'klyn & N. R. R. Co.*, 36

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id. 43; *Mowery v. C. C. R. Co.*, 51 id. 667; *Reynolds v. N. Y. C. & H. R. R. R. Co.*, 58 id. 252; *Thurber v. H. B., M. & F. R. R. Co.*, 60 id. 336; *McGarry v. Loomis*, 63 id. 107; *Fallon v. Central Park, etc.*, 64 id. 13; *Haycroft v. L. S. & M. S. R. R. Co.*, 2 Hun, 491; 64 N. Y. 636, 637; *Casey v. N. Y. C. & H. R. R. R. Co.*, 78 id. 518; 6 Abb. [N. C.] 104.) *Douling v. N. Y. C., etc., R. R. Co.*, 90 id. 670. In case of such collisions the law does not exact from the foot traveler mathematical certainty in the measurement of time, speed and distance to avoid the imputation of being guilty of contributory negligence. (*Kellogg v. N. Y. C., etc., R. R. Co.*, 79 N. Y. 72; *Stackus v. Same*, id. 464; *Briggs v. Same*, 72 id. 26; *Justice v. Lang*, 52 id. 323; *Dolan v. D. & H. C. Co.*, 71 id. 285; *Greany v. L. I. R. R. Co.*, 101 id. 419; 83 id. 620.) The dedication, acceptance and user are complete under the proofs on the last trial, and should not be disturbed to enable a railroad company to escape the legal consequences of its negligence. (*Bridges v. Wyckoff*, 67 N. Y. 130; *Niagara Falls S. Bridge Co. v. Bachman*, 66 id. 261; *Head v. Brooklyn*, 60 id. 248; *Taylor v. Hipper*, 2 Hun, 646; *In re Ingram*, 4 id. 495; *Holdane v. Trustees, etc.*, 21 N. Y. 474.) Proof descriptive of the railroad in the locality where the accident happened was proper. (*McGrath v. N. Y. C. & H. R. R. R. Co.*, 63 N. Y. 526, 527; *Leonard v. Same*, 42 Sup. Ct. 233; *Casey v. Same*, 6 Abb. [N. C.] 126; 78 id. 523; *Houghkirk v. D. & H. C. Co.*, 92 id. 227.)

EARL, J. There was some controversy upon the trial of this action as to whether or not the place where the plaintiff was injured was a traveled public highway, and the trial judge submitted the case to the jury upon the assumption that it was not. There was, however, evidence tending to show that there was an alley, at the place where the plaintiff was injured, which was extensively and notoriously used by the public, without any objection on the part of the defendant, or any question as to the right of all persons so to use it;

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and the judge charged the jury that it was a question for them to determine to what extent and in what manner the alley was used by the public; that if they came to the conclusion that the right of passage was there exercised by the public, as claimed by the plaintiff, notoriously and constantly, previous to and at the time of the accident, then they were required to determine the amount of care and prudence which the defendant was required to exercise in approaching and crossing the alley, and that then the defendant, while not absolutely bound to ring a bell or blow a whistle, yet was bound to give some notice and warning, reasonable and proper under the circumstances, in approaching the crossing; and that it was for them to determine whether such notice and warning was given. The law, as thus laid down, was fully warranted by the case of *Barry v. New York Central and Hudson River Railroad Company* (92 N. Y. 289). In that case it was held that where the public, for a series of years, had been in the habit of crossing the railroad, the acquiescence of the defendant in the public use amounted to a license or permission to all persons to cross at that point, and imposed the duty upon it, as to all persons so crossing, to exercise reasonable care in the movement of its trains so as to protect them from injury. We think that case, notwithstanding the criticism of the learned counsel for the defendant in this case, is in entire harmony with the previous cases of *Nicholson v. Erie Railway Company* (41 N. Y. 525), and *Sutton v. New York Central and Hudson River Railroad Company* (66 N. Y. 243). In the three cases, the distinction between active negligence causing an injury, and mere passive negligence, was clearly pointed out. In the *Barry Case*, the railroad company carelessly backed its cars against the plaintiff's intestate, and thus caused his death. In the other two cases, there was no active negligence, but simply an omission properly to fasten the cars which, without any human agency, moved, and thus ran against the persons injured. The recent case of *Larmore v. Crown Point Iron Company* (101 N. Y. 391), was similar. There it was decided that a person who went

upon the land of another, without invitation, to secure employment from the owner of the land, was not entitled to indemnity from such an owner for an injury received from a defective machine on the premises, not obviously dangerous, which he passed during the course of his journey; and that although it might be shown that the owner could have ascertained the defect by the exercise of reasonable care, yet that he owed no legal duty to a stranger so coming upon his premises which required him to keep the machinery in repair. That was plainly a case of mere passive negligence, an omission to keep a machine in repair which was not obviously dangerous. Here the ground of the defendant's liability is that its agents, engaged actively in its service, carelessly backed a car against the plaintiff and thus injured her. If she had been injured from a defect of the car or engine not obviously dangerous, the case would have been like the *Larmore Case*. If the car had moved upon her without any human agency, simply because it had not been sufficiently secured or fastened, then it would have been like the cases of *Nicholson* and *Sutton*.

There are points of resemblance and points of difference between the *Barry Case* and the other cases. Taking the points of resemblance, a plausible argument may be made to show that the cases conflict. But taking the points of difference, then, while the distinction between the *Barry Case* and the other cases is not so plain as a traveled highway, it is sufficient to require the application of different principles and the reaching of a different result.

The facts of this case, so far as they relate to the accident, are substantially the same as those proved upon the trial which was under review in 83 N. Y. 620, when this case first came to this court. Then we held that there was evidence sufficient for the consideration of the jury, both in reference to the plaintiff's contributory negligence and the negligence on the part of the defendant, and we see no reason to reconsider the conclusion in reference to those matters then reached. It is quite true that the evidence to establish freedom from negligence on the part of the plaintiff, and negligence on the part

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of the defendant is very weak and liable to much criticism, and yet we are constrained to think, as we did before, that it was proper for submission to the jury.

There was evidence tending to show that no bell was rung or whistle blown upon the engine attached to the train in approaching this crossing, and the court charged the jury that the defendant was not absolutely bound to ring a bell or to blow a whistle, but that it was bound to give such notice or warning of the approaching train as was reasonable and proper under the circumstances; that it was bound to give by bell, whistle or otherwise such reasonable notice as the jury should find the circumstances required. The charge as thus made was excepted to on the part of the defendant, and its counsel requested the court to charge that if the bell was rung, as testified to by defendant's witnesses, that was a sufficient warning of the approach of the train, and that the defendant was not bound to give any other notice or warning. The judge refused so to charge and the defendant's counsel excepted. In these rulings, there was no error. The defendant was backing its train toward this crossing which was extensively and notoriously used by the public, and it was bound to use reasonable and ordinary care so as not to endanger those who might be lawfully upon its track at that crossing. And what care and precautions, if any, besides ringing the bell it should have taken upon a train thus backing were properly left for the jury to determine; and so it was held in the *Barry Case*. There, as here, there was a dispute as to whether the bell was rung or the whistle blown as a warning for the approach of the train. There the court charged the jury that in running its cars the defendant was bound to give such notice and warning as in their judgment would be regarded as reasonable and proper and calculated fairly to protect the lives of persons using the crossing; that they were to determine whether in backing the train it observed that care and caution which was called for under the circumstances; and that it had a right to back the train, but, under the circumstances of the case, the question was whether it had the right to back it without giving

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warning in some way to the intestate. The defendant's counsel then requested the judge to charge the jury that if the bell was rung, the defendant was not bound to give any other warning, and in reply to the request the judge said that he left it for the jury to determine whether, under the circumstances, the ringing of the bell would have been such a warning as was requisite. This court held that there was no error in the charge as made or the refusal to charge. Judge ANDREWS, in his opinion, said: "We think it cannot be held as matter of law, under the circumstances of this case, that the ringing of the bell fulfilled the whole duty resting upon the defendant."

We find no error in the record, and the judgment should be affirmed with costs.

All concur.

Judgment affirmed.

THE PEOPLE ex rel. JAMES A. WRIGHT, Appellant, v.
ALFRED C. CHAPIN, Comptroller, etc., Respondent.

The provision of the act of 1855, "in relation to the collection of taxes on lands of non-residents" (§ 83, chap. 427, Laws of 1855), which authorizes the State comptroller where he shall discover that a sale of land for taxes was invalid or ineffectual to give title to the lands sold, to cancel the sale and refund the purchase-money, was intended to relieve the purchaser from the consequences of a defective tax title; the owner of the land is not properly a party to the proceedings; nor is he permitted in this way to test the validity of the sale.

Where, therefore, the owner of lands sold for taxes presented his petition to the comptroller, asking that the sale be canceled in pursuance of the authority conferred upon the comptroller by said act, and that officer denied the prayer of the petition. *Held*, that no right of the petitioner was finally determined, nor was he a person aggrieved by the decision, within the meaning of the provisions of the Code of Civil Procedure (§§ 2122, 2127), regulating the review by *certiorari* of the determination of a body or officer; and so, that he had no right to a review of the determination of the comptroller.

It seems that neither the act of 1873 (Chap. 120, Laws of 1873), nor that of 1885 (Chap. 448, Laws of 1885), give to the comptroller any new power in this respect; that while the owner may, the same as any other person,

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put the comptroller in the way to discover errors in the sale, he cannot compel an investigation, or if one is had, review the comptroller's decision.

(Argued February 21, 1886; decided March 21, 1886.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department entered upon an order made December 2, 1883, which affirmed the determination and proceedings of the comptroller of the State, upon an application to him to cancel a sale of lands of the relator for unpaid taxes.

The material facts are stated in the opinion.

W. B. Van Rensselaer for appellant.

Charles F. Tabor for respondent.

DANFORTH, J. The appellant, as owner of lands in the town of Morehouse, presented his petition to the comptroller of the State, asking that a sale of those lands in 1877, for the unpaid taxes of 1876, be canceled, and that any conveyance by virtue thereof be set aside and discharged of record. After hearing the evidence submitted to him, the comptroller denied the prayer of the petitioner, and upon review, his determination has been affirmed by the Supreme Court.

We do not see that any right of the appellant was finally determined by the comptroller, nor that he is a person aggrieved by the decision in question, and unless one or the other of these relations exist, he has no right to a review of the proceedings in which that determination was made (Code Civ. Pro., § 2122, subd. 1, § 2127). The application to the comptroller was not warranted by the statute referred to by the learned counsel for the appellant, and on which alone he relies (Laws of 1855, chap. 427). Section 83 of that act declares that "whenever the comptroller shall discover, prior to the conveyance of any lands sold for taxes, that the sale was for any cause whatever invalid or ineffectual to give title to the lands sold, the lands so improperly sold shall not be conveyed, but the comptroller shall cancel the sale, and forth-

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with cause the purchase-money and interest thereon to be refunded out of the State treasury to the purchaser, his representatives, or assigns." Section 84, that "If the error originated with the county or town officers, the sum so paid shall be a charge against the county from which the tax was returned; and the board of supervisors shall cause the same to be assessed, levied, collected and paid to the treasurer of this State." And section 85 provides, "If the discovery that the sale was invalid shall not be made until after the conveyance shall have been executed for the lands sold, it shall be the duty of the comptroller, on receiving evidence thereof, to cancel the sale, to refund out of the State treasury to the purchaser, his representatives or assigns, the purchase-money, and interest thereon, and to recharge the county from which the tax was returned, with the amount of purchase-money, and interest at the rate of seven per cent. from the time of the sale, and such county shall cause the same to be levied and paid, as provided in the last preceding section."

The evident object of these provisions was to enable the State to relieve the purchaser from the consequences of a defective tax title, and at the same time replenish its treasury by a speedy collection of the tax withheld from it. The owner of the land is not a party to the proceeding, nor is he permitted in this way to test the validity of the sale or tax. In such a controversy the purchaser would have an interest and a right to its protection in the courts, by the usual course of legal proceedings. The statute contains no intimation of a legislative purpose to deprive him of that right. It gives no process to bring him in, confers no power to compel witnesses. In short it creates no court, provides for a single transaction to which the comptroller and the purchaser are the only parties. By it the State voluntarily assumes a liability to refund money received on a sale where the tax proceedings have not been in accordance with the statute, and are invalid, thus subjecting itself to a just rule of responsibility, applied without a statute to inferior municipalities, (*Chapman v. City of Brooklyn*, 40 N. Y. 372), and no doubt

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binds the purchaser to submit to the determination of that officer, for the purchase was made subject to the provisions of the statute which provided for his decision. We think it goes no further. The purchaser does not complain. The appellant cannot. It is unnecessary, therefore, to consider the case upon its merits, but for the reason above stated we think the appeal should be dismissed, with costs.

All concur.

Appeal dismissed.

On a subsequent motion for reargument the following opinion was handed down.

DANFORTH, J. On November 11, 1884, the relator by petition represented to the comptroller that in December, 1871, he became sole owner of certain lots of land, numbered eighteen, twenty and thirty-four, in the north half of Arthur-boro patent, in the town of Morehouse, Hamilton county; that in 1877, they were sold for the taxes of 1870, and numbers eighteen and twenty conveyed to Ballow, and lot thirty-four to Peck; that the sale was void because, "*first*, the corrected assessment-roll for the town of Morehouse (being the township in which said lots are situated) for the year 1870, as delivered by the supervisor of the town of Morehouse to the town clerk thereof, is incomplete and defective, because (a) there is no oath of the assessors on said assessment-roll or attached thereto; (b) that these lots belong to non-residents, and that the number of acres of each lot is not given; (c) that the values of the above lots are not given; (d) that there is no fifth column at all; (e) that there are no figures set down to show the respective sums, in dollars and cents, to be paid as a tax on said lots. (1 R. S. 395, §§ 33, 35.) *Second*. That it does not appear from any statement in the collector's return and affidavit thereto, or the county treasurer's certificate, that the taxes for the year 1870, remaining unpaid were assessed upon the lands of non-residents," and prayed, therefore, that in pursuance of the authority conferred upon the comptroller by section 85 of chapter 427 of the Laws of the State of New

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York, passed in the year 1855, that the tax sale of 1877, so far as the same relates to lots numbered eighteen, twenty and thirty-four, in the north half of the Arthurboro patent, in Hamilton county and State of New York, be canceled, and that any conveyance delivered by virtue of said sale of the said lots be set aside and discharged of record.

The comptroller, after hearing, denied the application. The relator by *certiorari* sought to review that decision. Upon return made, the Supreme Court affirmed it. The relator appealed to this court. Upon the argument the learned counsel for the relator repeated upon his points the statement of the petitioner that "the application made by the relator on November 11, 1884, to the comptroller to cancel such tax sale was made under the authority of sections 83, 84 and 85 of chapter 427 of the Session Laws of 1855," and in reply thereto the learned attorney-general, for the respondent, submitted as a distinct proposition that there is no statute authority for the demand made by the relator upon the comptroller to cancel the sale; that the sections above named and cited by the appellant were enacted for the benefit only of purchasers who had paid their money on the strength of the title of the State, and gave no right to an owner of the lots either to make the demand that the comptroller cancel the sale, or, upon his refusal, to review that determination. This position was not answered by the relator upon any authority, nor other statute than that of 1855 (*supra*). We sustained the view of the attorney-general and, without passing upon the merits, dismissed the appeal (March 2, 1886). A motion for a reargument is now made by the relator upon affidavit of his counsel, showing that the point made by the attorney-general as to the limitation of the statute of 1855, was not taken in the Supreme Court, nor anticipated by the relator as one which might be made in this court, and therefore that he failed to cite decisions and statutes bearing upon, if not controlling the question, viz.: Laws of 1873 (chap. 120); Laws of 1885 (chap 448); *Clark v. Davenport* (95 N. Y. 477).

The beginning of this remedial legislation may be found

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in chapter 262 of the Laws of 1823, which enacted (§ 52) "that if the comptroller shall discover at any time before he conveys lands sold for taxes that the sale was, for any cause whatever, improper, he shall not convey the land so improperly sold but shall pay the purchasers of such lands the sum which they would be entitled to, if such land had been regularly redeemed by the owner, and the sum so to be paid shall be a charge against the county from which the return of the tax was made if the cause why such sale was improper originated with the county."

By 1 Revised Statutes (p. 413, § 89), this provision was re-enacted so as to read, "Whenever the comptroller shall discover, prior to the conveyance of any lands sold for taxes, that the sale was, for any cause whatever, invalid and ineffectual to give title to the lands sold, he shall not convey the lands so improperly sold, but shall forthwith cause the purchase-money, and interest thereon, to be refunded out of the treasury to the purchaser, his representatives or assigns."

And by section ninety-one it was provided that "if the discovery that the sale was invalid shall not be made until after a conveyance shall have been executed by the comptroller for the lands sold, it shall be the duty of the comptroller, on receiving satisfactory evidence thereof, to refund out of the treasury, to the purchaser, his representatives or assigns, the purchase-money and interest thereon; and to recharge the county from which the tax was returned with the amount of tax and interest, at the rate of seven per cent from the time interest was charged thereon by him, and such county shall cause the same to be levied and paid, as provided in the last section."

It is obvious that these provisions concern no one but the purchaser, the State, and the county or town from which the tax was returned. The act of 1850 (Chap. 298, §§ 102, 104), contains the same provisions, with slight verbal alterations, among others directing that after such discovery the comptroller shall cancel the sale. This was evidently for no other purpose than to preserve the regularity of the proceedings

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in the refunding and recharging process, and concerned only the State on one side and the town or county, as the case might be, on the other.

These provisions reappear in 1855 as sections 83 and 85. (Laws of 1855, chap. 427). It should be noticed that in no case is the comptroller authorized to recall a conveyance made by him, nor by his decision avoid or cancel it, except as the cancellation of the sale might, by vitiating the precedent steps, destroy the regularity of the proceedings. The cancellation of the sale affected the purchaser by impairing his title in one case and in another restored the purchase-price of an ineffectual grant; it affected the town or county by compelling it to bear the burden of retaxation. The power to cancel might be exercised upon misapprehension or misinformation, and, perhaps, for that reason it was enacted in 1873 (Laws of 1873, chap. 120), that the comptroller should have power to set aside any cancellation of sale made by him under the act of 1855 (*supra*), in either of three cases: "*First*. Whenever such cancellation was procured by fraud or misrepresentation. *Second*. Whenever such cancellation was procured by the suppression of any material fact bearing upon the case. *Third*. Whenever the cancellation was made under a mistake of fact." This, also, could concern only the rights or interests of the same parties.

The act of 1885 (Laws of 1885, chap. 448) can have no direct application to the case at bar, for it was enacted after these proceedings were commenced, and after the decision of the comptroller. The statute also limits its operation by declaring that it shall not affect a proceeding pending at the time of its passage. It amends section 65 of the act of 1855 (*supra*) by giving conclusive effect to the comptroller's conveyances after a specified time, but declares that "such conveyances and certificates, and the taxes and tax sales on which they are based, shall be subject to cancellation, as now provided by law, on a direct application to the comptroller, or an action brought before a competent court therefor, by reason of the legal payment of such taxes, or by reason of

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the levying of such taxes by a town or ward having no legal right to assess the land on which they are laid."

Neither its validity nor construction is before us except as it may bear by implication upon the power and duty of the comptroller, under the act of 1855. It gives no new power. The comptroller had been given none to cancel conveyances, neither his own deed, nor that of a remote grantor. He might cancel a tax sale. The court in a proper case had power to do that also, and such other acts as were essential to the protection of those affected by them, whether an owner, or mortgagee, or one otherwise interested. The statutory power of the comptroller, when exercised, is for the benefit of the purchaser, and, for reasons briefly stated in my opinion on the first argument, cannot be invoked in any legal sense by the owner. He may, indeed, as might any other person, put the comptroller in the way to "discover" errors in the sale, but he cannot compel an investigation, nor if one is had, review his decision.

In *Clark v. Davenport* (95 N. Y. 477), the learned judge, in denying the right of the appellant to the relief sought, referred incidentally to the statute of 1855, as giving a remedy in certain cases by the action of the comptroller under sections 83, 85 (*supra*), and says "no reason appears why the proceedings might not be reviewed by *certiorari*, or an application made by mandamus to compel him to do so," *i. e.*, to set aside the sale by reason of the irregularity and invalidity in imposing the taxes for which the sale was made." We were not there called upon to interpret the statute, and the remark made was suggestive merely, and not the resolution of the court upon any point to be determined, nor a direct opinion even of the learned judge by whom it was written, but rather a side blow put by way of argument. It was not necessary to the judgment rendered, nor was it put forth as ground or reason for it.

The office of comptroller was created, and his powers and duties are defined by statute. As between the purchaser at a tax sale and the State, under whose authority he acted, he

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may decide the questions of regularity relating thereto. He has no judicial power to determine a controversy between other parties, but to "discover" a fact, which, when found, is to determine his own conduct. (*People ex rel. Demarest v. Fairchild*, 67 N. Y. 334.)

Looking at the case, therefore, in the light of the argument for a rehearing, we find no reason for a decision differing from that before made.

The motion for a reargument should be denied, with costs.

All concur.

Motion denied.

104	377
126	484
104	377
135	250

THE PEOPLE ex rel. THE ROME, WATERTOWN AND OGDENSBURGH RAILROAD COMPANY, Appellants, v. PARLEY HAUPT et al., Assessors, etc., Respondents.

SAME, Appellants, v. GEORGE B. HOOD et al., Assessors etc. Respondents.

SAME, Appellants, v. PETER S. MOYER et al., Assessors, Respondents.

SAME, Appellants, v. PETER S. MOYER et al., Respondents.

The provision of the act of 1880 (§ 9, chap. 269, Laws of 1880), in reference to the review and correction of assessments, which requires completed and verified assessment-rolls of a town to be filed with the town clerk "on or before the first day of September" is directory merely, and when the roll is completed and verified, a delay in filing it does not vitiate the assessment.

Where upon *certiorari* it appeared that the relator had fifteen days after delivery of the assessment-roll to the town clerk within which to sue out his writ, *held*, that he might not complain as he had suffered no prejudice.

The object of the requirement of said act (§ 9), that the assessors shall give public notice of the completion of the roll is simply to set running the fifteen days within which parties aggrieved may sue out a writ of *certiorari* (§ 2); an omission to give the notice does not affect the validity of the assessment, it simply leaves the right to review by *certiorari* unlimited as to time.

The conclusions of the assessors upon conflicting evidence as to value of property assessed are not reviewable here.

(Submitted January 18, 1887; decided March 1, 1887.)

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APPEALS from orders of the General Term of the Supreme Court, in the fifth judicial department, made the first Tuesday of June, 1886, which affirmed orders of Special Term which quashed writs of *certiorari* issued to the assessors of certain towns in Niagara county, to review the assessments made in said towns upon the property of the relator, for the years 1883 and 1884.

The facts so far as material are stated in the opinion.

Edmund B. Wynn for appellant. The taxable value of the portion of a railroad situated in a particular town should be estimated as part of a whole, and the profits of the use of the road should be considered. (*People ex rel. O. & L. C. R. R. Co. v. Assessors*, 13 Abb. [N. C.] 1; 92 N. Y. 643; *People ex rel. W. V. R. R. Co. v. Keator*, 67 How. 277; 36 Hun, 592; *People ex rel. A. & G. Bridge Co. v. Weaver*, 67 How. 477; 34 Hun, 321; 99 N. Y. 659; *People ex rel. D. & H. C. Co. v. Assessors*, 2 How. Pr. [N. S.] 454.) It is not necessary to appear before the assessors to have errors corrected if their assessment of a taxpayer's property is illegal, erroneous or unequal. (*People v. Smith*, 24 Hun, 66.)

F. Brundage for respondents. The writs should have been quashed for the reason that there was no proof that the relator appeared before the assessors on grievance day and availed itself of the statutory means of correcting the errors complained of. (*People ex rel. M. U. Tel. Co. v. Com'rs of Taxes*, 99 N. Y. 254, 257; *People ex rel. Osgood v. Com'rs of Taxes*, id. 154; 2 R. S. 994, § 6.) The statement of the assessors in their return, that they assessed the relator's property at its full and true value as they would appraise the same in payment of a just debt due from a solvent debtor, was in strict compliance with the statute. (2 R. S. 992, § 17, 18; *People v. Frederick*, 48 Barb. 173; *People v. Barker*, id. 70; *People v. Dixon*, 8 Hun, 173; *A. & W. S. R. R. Co. v. Town of Canaan*, 10 Barb. 244; *People ex rel. Citizens' Gas Light Co. v. Assessors*, 39 N. Y. 81.)

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Railroad corporations are to be assessed in the same manner as individuals. (2 R. S. 990, § 6; *People v. Com'rs of Taxes*, 67 N. Y. 516, 521; 16 Barb. 244; 5 Lans. 142 48 Barb. 175; 48 N. Y. 70, 76; 91 id. 574; 76 id. 64, 75; *People ex rel. Beadle v. Newton*, 2 Alb. L. J. 437; 91 N. Y. 574, 581; *People v. Mayor, etc.*, 6 Hun, 652; *People v. Com'rs of Taxes*, 73 N. Y. 437; *S. C.*, 3 East. Rep. 569; *S. C.*, 82 N. Y. 459, 465; 76 id. 64, 75; 99 id. 154.)

Ellsworth & Potter for respondents. Discretionary power has been used in quashing the writ, and when the General Term affirmed that conclusion, the remedy of the relator was exhausted. (*People v. Pond*, 92 N. Y. 643; *People v. McCarthy*, 102 id. 630; *People ex rel. Second Ave. R. R. Co. v. Com'rs of Parks*, 97 id. 37; *People v. Com'rs of Taxes*, 85 id. 655; 99 id. 659.) The relator never was entitled to the writ, for the reason that it made default on grievance day. (2 R. S. [7th ed.] 994, § 6; 16 Barb. 607; 12 How. 224; *Wheeler v. Mills*, 40 Barb. 644; *People v. Forrest*, 96 N. Y. 544; *People v. Com'rs of Taxes*, 21 Week. Dig. 439.) No substantial error is pointed out, and unless such error can be found, an Appellate Court will not interfere. (*People v. Keator*, 36 Hun, 594.)

FINCH, J. The papers in four appeals from orders quashing as many writs of *certiorari*, and in another similar case not before us, are printed for our use with a disorder and confusion scarcely to be excused. With the aid of the briefs of counsel we hope that we have been enabled to understand and appreciate the questions sought to be raised. The General Term say that no questions of law, and only questions of fact, were presented by the appeals, but in the brief of the appellant we find three errors in the assessments alleged and relied upon as sufficient to vitiate the tax imposed.

One of these is, that the assessors of the town of Wilson did not meet to hear complaints on the third Tuesday of August, 1883, but met for that purpose only on the thirty-first of that month; and that the fact appears in the copy of

their notice marked Exhibit II. The fact so appears in the printed copy of that notice, but a stipulation, signed by counsel for both parties, certifies that the date of August thirty-first is a misprint and should read August twenty-first. The ground of objection, therefore, disappears.

It was charged in one of the petitions that the assessment-roll of the town of Wilson, for 1883, was not finally completed and verified by the assessors and delivered to the town clerk, or other officer to whom such roll is required by law to be delivered, on or before the 1st day of September, 1883. No proof was given on the subject, but the admissions of the return are relied on. Those show that the assessors met to hear complaints on the third Tuesday of August; that from that day until the twentieth of September the roll remained in possession of Cooper, one of their number, "open to inspection;" and on that day was "left, completed and verified, with the town clerk." The admission goes no further than the date of delivery to the town clerk, and does not show that the roll was not completed and verified on or before September first. An extract from the roll is all that is printed, the printing of the roll and assessor's affidavit having been waived. The delivery of the completed and verified roll is required by section 9 of the act of 1880 to be made to the town clerk, or other proper officer, "on or before the first day of September." The return shows a delivery twenty days later. Such delay did not vitiate the assessment. The provision is directory, and since the relator had his fifteen days, after the delivery to the town clerk, within which to sue out his writ, and did actually do so, we cannot see how it has suffered any prejudice from the delay. The town clerk returns that after its delivery to him it remained open for inspection in his hands for the required fifteen days. The return shows that the roll, which we must assume was completed and verified on or before September first, remained open to inspection in the hands of one of the assessors until the twentieth, and then, after due notice, so remained for fifteen days in the hands of the clerk. We should sacrifice

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substance to form if we held that such a mistake vitiated the whole assessment.

The question, under the act of 1880, assumes a different form as it respects the town of Somerset. Apparently the assessors of that town never published a notice of the delivery to the town clerk at all. The sole object of that provision, however, appears to be to set running the fifteen days within which parties aggrieved may sue out their writ (§ 2). If the notice be not given the right to review by *certiorari* remains unlimited as to time. The fifteen days are not set running. The consequence of the omission cannot be fatal to the validity of the assessment, but leaves the door open for a review, unlimited as to time. The assessment, lawfully made and completed, did not become "illegal" by the omission of the notice required by section 9 of the act of 1880.

The remaining questions arise wholly upon the facts. An inequality of assessment was asserted. Evidence of the value of farms largely in excess of the assessed values was given on behalf of the relator, but met by an equal, if not a larger, body of evidence sustaining the official valuations. An overvaluation of the railroad was sought to be proved, and a body of evidence was given relating to its earning capacity and tending to show that its value was overestimated. On the other hand, the sources and accuracy of that evidence were criticised, the cost of construction was shown, the opinions of experts were given, and back of all that remained the observation and judgment of the assessors. Upon the evidence the question of value was purely one of fact. It has been reviewed by the Special and General Terms, but should not be by us. No legal error is disclosed by the record which warrants our reversal of the proceedings.

The orders should be affirmed with one bill of costs in this court.

All concur.

Orders affirmed.

Statement of case.

MARY MURRAY, as Administratrix, etc., Appellant, v. ARTHUR G. Fox et al., Respondents.

SAME, Appellant, v. SAME, Respondents.

F. & W., who were copartners, executed two mortgages, one to secure a bond executed by F., the other a bond executed by both. Each of the bonds was given for partnership indebtedness. The mortgages covered certain lands owned by F. & W. jointly, also lands owned by F. alone. F. & W. subsequently conveyed the mortgaged lands owned by them, by full covenant deed, for a price that covered the full value of the unincumbered fee. F. died, and thereafter plaintiff, the administratrix of the mortgagee, negotiated a settlement of various claims the estate held against W., and plaintiff executed to W. a release and discharge, among other things, of all several and joint liability on account of the bonds and mortgages, which release recited that it was not intended "to affect or discharge the liability" of F., "or intended to affect any other security for any of said demands other than the personal liability of" W. In an action to foreclose the mortgages, *held*, that the release discharged the party primarily liable for the mortgage debt, and so cut off and destroyed the equitable right of subrogation belonging to the surety in case of payment, and, therefore, that the lien of the mortgages upon the lands bound as security were discharged.

Prior to the execution of the release by plaintiff, W. compromised with the said grantee of a portion of the mortgaged premises certain claims, held by it, and received a release of himself and the heirs of F. upon the covenants in the deed, and from all existing debts, matured and unmatured, with a covenant that the releasor had not parted with or impaired its title "to any such debts." *Held*, that the release of the covenants in the deed did not *ipso facto* discharge the equities which might arise in favor of the covenantee against the covenantor, or make the land principal debtor for the mortgage; but that it remained chargeable only as surety, and the right of subrogation remained, which was cut off by plaintiff's release.

(Argued January 20, 1887; decided March 1, 1887.)

APPEALS from two judgments of the General Term of the Supreme Court in the fifth judicial department, entered upon orders made January 23, 1886, which affirmed judgments in favor of plaintiff, each entered upon decisions of the court on trial without a jury. (Reported below, 39 Hun, 108.)

These actions were brought by plaintiff as administratrix of the estate of Hugh Murray, deceased, to foreclose mortgages,

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both executed by Arthur W. Fox and Horace Williams to said Murray, formerly copartners, upon certain pieces of real estate in Buffalo, a portion of which were owned by the mortgagors jointly and a portion by Fox alone. One of said mortgages was given to secure the payment of a bond executed by Fox alone, the others to secure the joint and several bond of the mortgagors. Both bonds were given to secure indebtedness of the copartnership.

The further material facts are stated in the opinion.

Ansley Wilcox for appellant. When, by an agreement between the principal debtor and the creditor, the remedy of the creditor is reserved against the surety, the situation of the surety is not changed and he is not discharged. (*Morgan v. Smith*, 70 N. Y. 545, 546; *Matthews v. Chicopee M'fg. Co.*, 3 Robt. 713; *Calvo v. Davies*, 73 N. Y. 217; *Hubbell v. Carpenter*, 5 id. 171; *Price v. Barker*, 4 Ellis & Bl. 760; *Boaler v. Mayer*, 10 C. B. N. S. 76; 8 Jacob's Fisher's Dig. 12894; *Wagman v. Hoag*, 14 Barb. 239; *Couch v. Mills*, 21 Wend. 424.) A release may expressly extend only to the party released, with the express reservation of rights against other parties, in which case it will be construed only as a covenant not to sue. (1 Pars. on Con. 28; 2 id. 715; Chitty on Con. 863; 2 id. [11 Am. ed.] 1155; *Parmelee v. Lawrence*, 44 Ill. 405; Brandt on Suretyship, § 123; 7 Jacob's Fisher's Dig. 11564; *Couch v. Mills*, *supra*; *Morgan v. Smith*, 70 N. Y. 545; *Calvo v. Davies*, 73 id. 217; *Conn. Fire Ins. Co. v. Erie R. Co.*, id. 399; *Tripp v. Vincent*, 3 Barb. Ch. 613; *Bentley v. Vanderheyden*, 35 N. Y. 680; *Johnson v. Zink*, 51 id. 333; Story Eq. Jur., § 1231, c.) The conveyance by warranty deed containing full covenants (covenants against incumbrance, included), of said mortgaged premises, gave the sugar company an immediate right of action for the breach of those covenants. (Rawle on Cov. [4th ed.] 355; *Braman v. Bingham*, 26 N. Y. 495; *Hall v. Dean*, 13 Johns. 105; *Browne v. Lynde*, 91 N. Y. 92; *Johnson v. Zink*, 51 id. 333; *Flower v. Lance*, 59 id. 608; *Cherry v. Monro*, 5

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Barb. Ch. 619; *Tripp v. Vincent*, *supra*; *Curtis v. Tyler*, 9 Paige, 432, 445; *Russell v. Pistor*, 7 N. Y. 171; Story's Eq. Jur., §§ 499, 502, 638; *Moore v. Paine*, 12 Wend. 126; *Vail v. Foster*, 4 N. Y. 312; *Nat. Bk. v. Bigler*, 18 Hun, 400, *Crosby v. Crafts*, 5 id. 327; *Pratt v. Adams*, 7 Paige, 627; *Wadsworth v. Lyon*, 93 N. Y. 201-208.) Where a grantee, like the Grape Sugar Company in the present case, for a valuable consideration, releases the express covenants, which gave it a remedy over against its grantor in case of a foreclosure of the mortgage, there can be left no implied right of subrogation or implied right to recover against the grantor. (*Vanderkarr v. Vanderkarr*, 11 Johns. 122; *Kent v. Welch*, 7 id. 259; *Frost v. Raymond*, 2 Caines, 188.) The plaintiff produces the bond and mortgage in suit, which is *prima facie* evidence that they have not been paid, and the burden of proof is upon the defendants to establish payment by a preponderance of evidence. (*Ritter v. Schenk*, 101 Ill. 387; 2 Greenl. on Ev., § 516; 3 id. § 29; *Powers v. Russel*, 13 Pick. 76; *Delano v. Bartlett*, 6 Cush. 366; *Stearns v. Fields*, 90 N. Y. 640; *Heilman v. Lazarus*, id. 673.) No presumption from lapse of time of the payment of a mortgage can arise under our statute within twenty-four years after the mortgage becomes due. (4 R. S. [7th ed.], § 381; *Ingraham v. Baldwin*, 9 N. Y. 45; *Daly v. Ericsson*, 45 id. 786.) An administrator cannot create a debt against the deceased, and it is immaterial how clearly the intent to do so may be expressed, for, having no power to bind the estate, he only binds himself by such a contract. (*Sumner v. Williams*, 8 Mass. 199; *Myer v. Cole*, 12 Johns. 349; *Barry v. Bush*, 1 T. R. 691.) This agreement not being signed by the plaintiff, but by her attorney in fact, is void. The plaintiff could not delegate the power to make it. (2 Williams' Ex'rs, 1011, 1018; Dayton on Surrogates [1861], 310; *Neal v. Patten*, 47 Ga. 73; 1 Sugden on Powers [3d Am. ed.], 214; *Newton v. Bronson*, 13 N. Y. 587; *Berger v. Duff*, 4 Johns. Ch. 367.) To entitle a third person to the benefit there must be either a new consideration or some prior right or claim

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against one of the contracting parties, by which he has a legal interest in the performance thereof. (*Vrooman v. Turner*, 69 N. Y. 280; *Garnsey v. Rogers*, 47 id. 233; *Turk v. Ridge*, 41 id. 201; *Merrill v. Green*, 55 id. 270.)

Adelbert Moot for respondents. The evidence of defendants established payment of the mortgages. (*Wise v. Fire Ins. Co.*, 4 East. Rep. 51; *Ferry Co. v. Moore*, 102 N. Y. 667; *De Forest v. Bloomingdale*, 5 Denio, 304; *Sherman v. McIntyre*, 7 Hun, 593; *Lake v. Lysen*, 6 N. Y. 461.) The release and discharge to Williams under seal is conclusive evidence of the payment of the firm debt. (*Ryan v. Ward*, 48 N. Y. 204; *Harrison v. Close*, 2 Johns. 448; *Stearns v. Tappan*, 5 Duer. 294; *Eighmie v. Taylor*, 98 N. Y. 288; *Lyon v. Hersey*, 7 East. Rep. 490.) The facts proved and found show an accord and satisfaction. (*McDaniels v. Lapham*, 21 Ver. 223, 234; *Lamb v. Goodwin*, 10 Ire. 320, 323; *Donahue v. Woodbury*, 6 Cush. 150; *Feeter v. Weber*, 78 N. Y. 334; *Dunham v. Griswold*, 100 id. 224.) When one of two persons, who gives a joint and several bond, and secures the payment of the bond by a mortgage on his individual property, the individual property mortgaged is *prima facie*, a surety for the payment of the bond, and the owner of the land is entitled to all the rights which protect a surety in any other case. (*Grow v. Garlock*, 97 N. Y. 86; *Colgrove v. Tallman*, 67 id. 95; *Calvo v. Davies*, 75 id. 211; *Palmer v. Purdy*, 83 id. 144; *Murray v. Marshall*, 94 id. 614; *Ayers v. Dixon*, 78 id. 323, 324.) If the property of these two classes of defendants was bound as a surety only, then, upon the payment of the mortgage debt, either one so paying is entitled, in equity, to be subrogated to the mortgage debt with all the securities and means which the mortgage creditor has for enforcing it. (*Fairchild v. Lynch*, 99 N. Y. 364; *Wadsworth v. Lyon*, 93 id. 201; *Ayers v. Dixon*, 78 id. 323, 324; *Murray v. Marshall*, 94 id. 614, 616; *Grow v. Garlock*, 97 id. 81.) Whenever the relation of surety exists, the creditor owes a duty to the surety, not always

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an active duty, but a duty to leave the time and manner of payment unchanged; a duty to keep intact all obligations against the principal; and plaintiff having disregarded this duty, defendants are discharged. (*Kane v. Cortesy*, 100 N. Y. 132.) Williams, the survivor and principal debtor, was discharged by the plaintiff. As to the bond made out in the name of Arthur W. Fox alone, his representatives cannot be sued, it being for a firm debt, until the legal remedy against Williams, the survivor of the firm, had been exhausted. (3 Pomeroy's Juris., § 1301; *Parker v. Jackson*, 16 Barb. 44; *Moorehouse v. Ballou*, id. 289; *Haines v. Hollister*, 64 id. 1; *Hunt v. Amidon*, 4 Hill, 345, 348; *Merritt v. Bartholick*, 36 N. Y. 44; *Bennett v. Austin*, 81 id. 321; *Voorhis v. Childs*, 17 id. 356; *Richter v. Poppenhausen*, 52 id. 373.) Williams, the survivor, was the principal debtor at law and in equity, and, as such, primarily charged with the debts of the firm, and absolutely vested with the legal title to its assets, wherewith to discharge those debts. (*Roeschick v. Hatfield*, 51 N. Y. 660; *Nerboss v. Bliss*, 88 id. 600; *Stearns v. Tapping*, 5 Duer. 294; 1 Pomeroy's Eq. Jur., § 383.) Unless the contrary clearly appears from the instrument itself, or the surrounding circumstance, a release or discharge under seal of a principal is also a release and discharge to the sureties, even though it formally contain a reservation over of rights against sureties or securities. (*Lyon v. Hersey*, 7 East. Rep. 490; *Aloff v. Scrimshaw*, 2 Salk. 574; 1 Chitty on Cont. [11th Am. ed.] 575, 774; Brandt on Suretyship and Guaranty, 173, § 122; *Brown v. Williams*, 4 Wend. 365; *Phelps v. Johnson*, 8 Johns. 54; *Matthews v. Chicopee M'f'g Co.*, 3 Rob. 713; *Clark v. Bush*, 3 Cow. 151; *Cuyler v. Cuyler*, 2 Johns. 185; *Phelps v. Johnson*, 8 id. 54; *Harrison v. Close*, 2 id. 448; *Rowley v. Stoddard*, 7 id. 207; *Catskill Bk. v. Messenger*, 9 Cow. 37; *Chenango Bk. v. Osgood*, 4 Wend. 607; *Couch v. Mills*, 21 id. 424; *Hosack v. Rogers*, 8 Paige, 229; *Seymour v. Minturn*, 17 Johns. 169; *Bronson v. Fitzhugh*, 1 Hill, 185; 2 Chitty on Cont. 1154; *Price v. Barker*, 4 El. & Bl. 760)

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Neither defendant could be subrogated to the debt as against Williams, after his discharge. He was good, and the right of action against him on the bond was a perfect security for the whole debt at the time he was discharged. (3 Pomeroy's Eq. Jur., §§ 1210, 1214, 1419; *Grow v. Garlock*, 97 N. Y. 81; *Murray v. Marshall*, 94 id. 616; *Dutcher v. Rupp*, 67 id. 464; 1 Story's Eq. Jur., § 325; *Hoyt v. Ward*, 4 Johns. Ch. 123; *Bangs v. Strong*, 10 Paige, 11; *Calvo v. Davies*, 73 N. Y. 215; *Palmer v. Purdy*, 83 id. 147.) The plaintiffs are in error in contending that section 1942 of the Code does not apply to this release. (*Richter v. Poppenhausen*, 42 N. Y. 373; *Cole v. Pope*, 55 id. 124; *Rixley v. Brown*, 67 id. 160; *Hauck v. Craighead*, id. 432; 1 Pomeroy's Eq. Jur., § 409; *Randall v. Sackett*, 77 N. Y. 480; *Candee v. Smith*, 93 id. 349.) As this is an equity action the court will not reverse the judgment if it can be sustained upon competent proof upon any point fatal to plaintiff's recovery. (*Church v. Kid*, 3 Hun, 259; *Marvin v. Marvin*, 11 Abb. [N. S.] 102; 4 Keyes, 9; *King v. Whaley*, 59 Barb. 71; *Apthorp v. Comstock*, 2 Paige, 482; *In re N. Y. C. & H. R. R. R. Co.*, 90 N. Y. 346, 347.)

John G. Milburn for respondents. The indebtedness secured by the bond and mortgage being the indebtedness of the firm of A. W. Fox, Williams, as one of the partners in the firm, was liable as such; and on the death of Fox, in 1874, Williams, as the survivor, was primarily liable. (*Voorhees v. Child's Ex'rs*, 17 N. 354; *Richter v. Poppenhausen*, 42 id. 373; *Pope v. Cole*, 55 id. 124.) The position of the Grape Sugar Company, as grantee of the mortgaged premises, was that of a surety with respect to this mortgage debt. (*Wadsworth v. Lyon*, 93 N. Y. 201, 208, 214; *Barnes v. Mott*, 64 id. 397; *Murray v. Marshall*, 94 id. 353; *Cole v. Malcolm*, 66 id. 363; *Colegrove v. Tallman*, 67 id. 95, 97, 98; *Ellsworth v. Lockwood*, 42 id. 89, 97, 98; *Henckley v. Kreitz*, 58 id. 591; *Lewis v. Palmer*, 28 id. 271; *Matthews v. Aiken*, 1 id. 595.) The release, by the plaintiff, of the

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obligor, Williams, from all liability on this bond, exonerated the lands conveyed to the Grape Sugar Company from the lien of the mortgage. (*Barnes v. Mott*, 64 N. Y. 397; *Chester v. Bk of Kingston*, 16 id. 336; *Henckley v. Kreitz*, 58 id. 583; *Grow v. Garlock*, 97 id. 81; *Cheesebrough v. Millard*, 1 Johns. Ch. 409; *Polak v. Everett*, L. R. [1 Q. B. D.] 669; *Mayhew v. Crickett*, 2 Swanst. R. 185; *Bangs v. Strong*, 10 Paige, 11; *Bateson v. Gosling*, L. R. [7 C. P.] 9; *Lysaght v. Duer*, 5 Duer, 106.) The release given in 1881, by the Buffalo Grape Sugar Company, to Williams and the estate of Fox, from all liability on the covenants contained in its deed, does not change the relation of the parties or the consequences of the release given by the plaintiff to Williams. (*Van Rensselaer v. Kearney*, 11 How. [U. S.] 631; *Wadsworth v. Lyon*, 93 N. Y. 208.) The payment of the bond and mortgage was established and the finding of the court to that effect is well sustained. (Code of Civ. Pro., § 1337; *Haight v. Williams*, 46 N. Y. 683; *Stilwell v. Ins. Co.*, 72 id. 385.) The plaintiff's breach of the agreement of April 29, 1881, exonerated the lands of the Grape Sugar Company from the lien of the mortgage in suit. (Pomeroy's Eq. Jur., §§ 3, 64.) It was competent and proper to show that this agreement was made on behalf of the Grape Sugar Company. (*Coleman v. Bank*, 53 N. Y. 388.)

FINCH, J. The most important question in these cases grows out of the release executed by the plaintiff, which purports to discharge the party primarily liable for the mortgage debt from all responsibility for its payment. The bond in the first action was executed by Arthur W. Fox, and secured by the mortgage of Fox & Williams. The bond in the second action was executed by both and secured in like manner. The mortgages incumbered parcels of land which had been conveyed by Fox & Williams to the Grape Sugar Company by a full covenant deed, and for a price which covered the full value of the unincumbered fee; a fact which the trial court found upon sufficient evidence, and

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which is inferable from the character of the conveyance and the scope of the covenants contained in it. Fox & Williams were partners when the bonds were given; doing business at first in the name of Arthur W. Fox and later in that of Arthur W. Fox & Company; and each of the bonds was given for and represented an indebtedness of the partnership. That fact is also found by the trial court upon evidence quite sufficient to sustain it. The mortgages covered other lands of Fox in addition to that conveyed to the Grape Sugar Company, which, upon the death of Fox, descended to his heirs, who were named among the parties defendant in the foreclosure actions. Williams, as survivor of the firm, in possession of its assets and liable for its debts, was thus left a primary debtor for the bonds in suit. An action upon two notes of the firm was brought in another State where he chanced to be, and resulted in negotiations for a settlement of his liability, which culminated in the payment by him to the administratrix of the mortgagee of \$13,500 upon an agreement of release and discharge, put in writing and formally executed, the construction of which is to be ascertained and determined.

That instrument recites the two bonds and mortgages now sought to be enforced; the execution by Fox and Williams of two other collateral mortgages; the delivery of two notes of the firm to the plaintiff's intestate, one for \$6,500, and one for \$610; the existence of other dealings between the parties; and the willingness of the administratrix to release Williams without discharging any other party or liability; and then provides that Williams is discharged and released from "all several liability on account of said bond, mortgages, notes, and all other doings whatsoever," and from "all joint liability on account of said bond, mortgages, notes, and other dealings and demands in connection with said firms," and concludes thus: "But not intending hereby to affect or discharge the liability of said Arthur W. Fox or his estate therefrom, or affect or discharge any other security for any of said demands other than the personal liability of said Williams." Previous

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to the execution of this release the Grape Sugar Company had discharged the Fox estate and Williams from all liability on their covenants of warranty; and assuming, what is denied and must later be considered, that the corporation stood in the attitude of a grantee buying for a full consideration, but without covenants, land incumbered by a mortgage, and so entitled on payment of the mortgage debt to enforce the bond against the mortgagor (*Wadsworth v. Lyon*, 93 N. Y. 201 208), it follows that the release of Williams, by plaintiff, cut off and destroyed the equitable right of subrogation belonging to the surety, unless the latter right is saved by the reservation. It is undoubtedly true that one of several debtors, jointly, or jointly and severally, liable for the same debt, may be released in such manner and with such reservation as will preserve the right of recourse against the others, even though sureties, when their rights and equities can be said to have been also preserved and left unaffected, the release becoming a mere covenant not to sue. It is strenuously insisted that such a rule of construction cannot possibly apply to the release of a sole debtor, not jointly liable at the time with any one, and that a covenant not to sue him must necessarily discharge and release the debt. (*Brown v. Williams*, 4 Wend. 360, 365) But there is room for debate as to whether the liability of Williams, originally joint with Fox, has become in all respects sole and several within the meaning of the authority cited, and we prefer to proceed with the inquiry as to the construction of the reservation. If, by its terms, the equity of the Grape Sugar Company to pay the debt in exoneration of its land, and then recover that amount from Williams, is preserved, then the release did not affect the surety and left its liability unchanged. However astonishing such a result would be upon the facts proven in the case, and however difficult it may be to believe that Williams meant and intended to pay \$13,500 for a mere covenant not to be sued by Murray, leaving himself liable for the full mortgage debt to the Grape Sugar Company, and so paying that large amount for a mere choice of plaintiffs, that must be the

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effect of the reservation unless something in it indicates a different intent and admits of a construction more in accord with the obvious purpose and understanding of the parties. There are such expressions. The release discharges "all liability" "on account of" such mortgages. Not merely *some* liability, as, for example, that to a specific person, but "*all*" liability "on account of" the mortgages, evidently meaning every possible liability of Williams which could in any manner or at anybody's suit spring from the existence of the securities. And this meaning is sedulously preserved and carefully guarded in the peculiar phraseology of the reservation. As we read it, that reservation of the right to enforce other securities is not absolute and unconditional, and so inconsistent with what precedes it, but is limited and restrained precisely as we should expect to find it, having in view the situation and expressed purpose of the parties. The intent is declared to be "not to affect or discharge any other security for any of said demands, *other than* the personal liability of said Williams." That qualifying clause was inserted to preserve the full scope of the previous provision releasing Williams from all liability on account of, that is, originating in or springing from the mortgages. The obvious meaning is that the releasor discharges no security which may be enforced without involving the liability of Williams, and preserves all such as can be enforced without bringing, as a result, recourse against him. He was to be entirely discharged at all hazards from every liability, direct or indirect, and those securities were to be preserved, and those only whose enforcement was consistent with that primary and dominant purpose. Both parties may have believed that since Fox was sole obligor in one bond, Williams would stand as a surety mortgagor as to that, and so remedy could be had against the Fox heirs without a recourse over to Williams. Both parties, too, may have thought, what indeed is now asserted, that the mortgages could be enforced against the Grape Sugar Company without peril to Williams by reason of its release of covenants, and so it is easy to see why the

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reservation was made and its existing form. At all events it is limited and restrained, and the presence of the concluding phrase can have no force or explanation except to preserve the consistency of the instrument and its full effect as a discharge of Williams. This construction seems to us not only natural and reasonable, but fairly explains the large payment made by Williams and redeems it from the level of a marvelous and absurd folly.

But the appellant contends that even upon this construction the rights of the Grape Sugar Company were not infringed because it had already parted with those rights by its release of the Fox heirs and of Williams, previously executed. That release contains substantially two classes of provisions. It discharges the liability of the Fox heirs and of Williams upon the covenants in the deed, and then from all existing debts matured and unmatured. A large number of these, resting in notes of \$5,000 each, are specifically mentioned, and a final covenant relating to the liabilities intended to be released, that the releasor has not parted with or impaired its title "to any such debts," indicates clearly that debts existing and to which the company had title were those referred to. It is not admissible to construe the release as operating upon debts non-existent, but possible to arise in the future. The argument on behalf of the appellant is, that a release of the covenants *ipso facto* discharged the equities possible to arise in favor of the covenantee against the covenantor. If that be true, the bare act of releasing the covenants made the land principal debtor for the mortgage, and amounted to an assumption by the Grape Sugar Company of the mortgage debt. No such agreement or intent is contained in the terms of the release, and must exist, if at all, as an inference, from the bare fact of a discharge of the covenants for a valuable consideration. I think that fact standing alone does not justify or compel the inference. If the actual consideration had been shown, and it had appeared that the covenantors paid to the covenantee the amount of the outstanding mortgages, or that for a less sum they agreed

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to take the peril of a foreclosure, the inference would follow. But, where the consideration is unknown and unexplained, and may have been merely adequate to cover the technical breach of covenant already existing, and no agreement or purpose of assumption is proved, I think the asserted inference does not follow, the equitable duty of payment is not shifted, the debt remains the debt of Fox & Williams, and the land chargeable only as surety. It is said that an express covenant destroys or restrains an implied one. That is true, but there are no implied covenants in a deed to be destroyed or restrained. The statute forbids them, and that fact demonstrates that the equities of a grantee whose land has been sold for another's debt, rest not at all upon any implied covenant, but upon the just needs of the situation as they appeal to the conscience of the court. Unless, then, the equities of the situation are changed by the fact of the release, they must necessarily remain. That the taking of covenants does not impair or destroy the equitable right of the grantee to be protected against the forced payment of a debt which he has not assumed has been often decided, and is established by the cases which on a foreclosure have preserved to the grantee, although holding covenants of warranty, the equitable right to have the lands of the grantor covered by the mortgage first sold and applied to its payment. If one equitable right survives the taking of covenants (*Clowes v. Dickinson*, 5 Johns. Ch. 235; *Skeel v. Spraker*, 8 Paige, 182), why may not another? It is possible that an equitable right precisely equivalent to the legal right on the covenants might prove to be suspended during the existence of such legal right, simply because equity does not waste its resources or act without necessity, but the equity would be merely suspended, and not killed. Its death could only come from such a change in the relation of the parties as would throw justly upon the grantee the burden of the debt. And so the question comes back and seems to me to be the ultimate inquiry whether the bare fact of a release of covenants of warranty for a valuable

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consideration compels an inference that the releasor assumed as his own a mortgage debt of the grantor. I think not. Something more must appear to warrant the inference. In the present case, other and entirely different purposes may have occasioned the release. There may have been defects in the title not here disclosed and which the parties had principally in view; it may have had reference to the technical breach which already existed; or, what is more probable, it may have been given and received on the supposition that the grantors had already paid and settled the mortgage debt, or if not, that the releasors would have ample protection against loss in the very equities which they now invoke. For these reasons I cannot accede to the inference sought to be drawn, and since the equity remained and the necessity for its protection has come, I think it may be enforced.*

* * * * *

The judgment should be affirmed with costs.

All concur, ANDREWS, J., on second ground set forth in opinion.

PHILIP BECKER et al., Assignees, etc., Respondents, v. HENRY H. KOCH, Sheriff, etc., Appellant.

Exceptions herein were ordered to be heard at first instance at General Term, and upon argument there an order was made denying motion for new trial, overruling the exceptions and directing judgment on the verdict. Defendant appealed from the order and from the judgment entered thereon. Plaintiffs claimed the order was not appealable, and that the appeal from the judgment brought up nothing for review but the question whether the judgment was in accordance with the order, as there was no statement in the notice of appeal that the appellant

*NOTE—The omitted portion of the opinion is the "second ground" referred to in *mem.* of decision. Payment of the mortgages was pleaded as a defense and was found by the trial judge. The court discuss the evidence bearing on that subject and come to the conclusion that it was sufficient to sustain the finding. — [Rep.

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intended to bring up for review an intermediate order as required by the Code of Civil Procedure (§§ 1301, 1310). *Held*, that the order was not an intermediate order, within the meaning of the Code, and that while the appeal therefrom was useless, yet, as it was taken in connection with the appeal from the judgment, it was not necessary to dismiss it, as the latter brought up all the exceptions for review.

In an action by assignees for the benefit of creditors, to recover possession of property covered by the assignment, which had been levied upon by defendant as sheriff, by virtue of an attachment against the assignor, the defendant alleged the assignment to be fraudulent and void as to creditors. On the trial defendant called the assignor as a witness, and after he had testified to facts and circumstances, from which an inference of fraud could properly be drawn, he gave an explanation thereof, which, if true, was sufficient in law. Defendant then rested, and the court directed a verdict for plaintiff, on the ground that defendant was bound by the explanatory evidence, for the reason that he could not discredit or impeach his own witness. *Held*, error; that the witness was to be regarded as adverse to the party calling him, and the same credit was not necessarily to be given to the testimony against that party, as to that in his favor; and that it was a proper question for the jury as to what degree of faith should be given under the facts of the case to the explanatory testimony.

It seems the rule prohibiting a party from impeaching his own witness applies only to prevent, *First*. The calling of witnesses to impeach the general character of the witness. *Second*. Proof of prior contradictory statements by him. *Third*. A contradiction of the witness by another when the only effect is to impeach and not to give material evidence upon any issue in the case.

Branch v. Levy (46 Sup. C. R. [14 J. & S.] 428), overruled.

(Argued January 25, 1887; decided March 1, 1887.)

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, in favor of plaintiffs, entered upon an order made May 9, 1885, which, after reciting that a motion had been made for new trial, ordered to be heard at first instance at General Term, denied said motion, overruled the exceptions, and directed judgment on a verdict; also appeal from said order.

The nature of the action and the material facts are stated in the opinion.

Charles B. Wheeler for appellant. A debtor who makes a general assignment for the benefit of his creditors must

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devote all his property to the payment of his debts, and the withholding of any sum of money at the time of making the assignment from the assignee must in some form be explained, otherwise it is sufficient to establish a fraudulent intent. (*White v. Fagan*, 18 N. Y. Week. Dig. 358; *Schultz v. Hoadland*, 85 N. Y. 464.) Courts do not require in cases of this kind the most conclusive proof of fraud. (Bump on Fraudulent Cont. 602.) A verdict having been ordered for the plaintiffs upon the trial, on the ground that there was no evidence showing that the assignment in question was fraudulent and void, the appellant is entitled to the most favorable view of which the evidence is susceptible, to determine whether there was any evidence from which the jury could properly have found the fraud alleged. (*Second Nat. Bk. v. Dix*, 3 East. Rep. 595.)

Baker & Schwartz for respondents. It is the duty of the court at the close of the party's proof, to direct a verdict against him if he has failed to show a case or defense, or whose evidence is so slight that it would be the duty of the court to set aside a verdict in his favor. (*Herring v. Hoppock*, 15 N. Y. 409, 413; *People ex rel. Peck v. B'd of Police*, 14 Abh. 158, 159; *Goelz v. Ross*, 15 id. 251; *Barrett v. First Ave. R. R. Co.*, 1 Sweeny, 563; *Shirley v. Vuil*, 38 How 406; *Bailey's Trial Pr.* 228, 229.) Defendant calling as a witness the alleged perpetrator of the fraud, and examining him with reference to his assignment, so far as he thought it to his advantage, irrevocably assured the court that he was a person entitled to be believed as a witness, and, therefore could not impeach him. (Penal Code, § 587; *Lawrence v. Barker*, 5 Wend. 301; *Branch v. Levy*, 46 N. Y. Supr Rep. 428; 1 Greenl. on Ev., § 442.)

PECKHAM, J. This action was brought by the plaintiffs as assignees for the benefit of creditors of one Exstein, to recover from the defendant the possession of some personal property amounting in value to about \$4,000, or in default thereof to recover such value.

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The defendant justified the taking of the property by virtue of a writ of attachment issued to him as sheriff of Erie county, in an action in which Victor and others were plaintiffs and Exstein was defendant, and under which writ the sheriff had levied upon this property as belonging to the said Exstein. The assignment to plaintiffs was made on the 17th of October, 1883, and included the property in question. The attachment was on the fourteenth of November levied on the property, and after the plaintiffs in the attachment suit recovered judgment against Exstein, the property was sold on an execution issued thereunder to the defendant. The answer in this action set up these facts and alleged that the assignment to the plaintiffs was made with the intent on the part of Exstein to hinder, delay and defraud his creditors. The action came on for trial in the Superior Court of Buffalo, and after the evidence was all in, the court directed a verdict for the plaintiffs for a return of the property to them or for the value thereof, assessing the same at \$3,800. A stay of proceedings was granted and the defendant's exceptions were ordered to be heard at the General Term in the first instance.

The General Term after argument of such exceptions overruled the same and directed judgment for the plaintiffs on the verdict. Thereupon an order was entered, which in form treated the defendant as having made a motion for a new trial on the exceptions ordered to be heard in the first instance at General Term, and after reciting such fact continued thus: "Ordered that such motion be and the same hereby is denied with costs; that the said exceptions be and the same hereby are overruled and judgment for the plaintiffs on the verdict is hereby ordered."

Judgment in accordance with the order was subsequently entered.

The defendant then appealed from the order above mentioned to this court, and also from the judgment entered upon such order.

The plaintiffs now make the claim that the appeal from the order should be dismissed, and that the appeal from the judg-

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ment brings up nothing for review but the question whether the judgment appealed from is in accordance with the order of the General Term, as there was no statement in the appeal from the judgment that the appellant intended to bring up for review any intermediate order, as pointed out by sections 1301 and 1316 of the new Code.

There is no foundation for the claim. The exceptions of the appellant were ordered by the trial court to be heard in the first instance at the General Term, and it was pursuant to such direction that the argument of such exceptions was then had, and the decision of the court upon such argument was made in the form of an order, and that order was simply a written authority upon which to enter the judgment, and was not such an intermediate order as is referred to in section 1301 or 1316, and no appeal would lie from it to this court. But after the entry of judgment an appeal from such judgment brings up for review the exceptions taken by defendant upon the trial.

The appeal taken by defendant from the order, as well as from the judgment, was useless, but evidently taken from more abundant caution, and if that were the only appeal in the case it would have to be dismissed as unauthorized, yet as it is taken in connection with the appeal from the judgment which brings up all the exceptions for review, there is no necessity to formally dismiss the appeal from the order. But upon the merits of the appeal, quite an important question arises in relation to the law of evidence.

The court directed a verdict for the plaintiffs, and if, therefore, there was evidence enough to authorize a submission of the question of fraud to the jury the judgment must be reversed. We think there was, and had it not been for the rule of law adopted by the court below we suppose that court would have been of the same opinion. That rule was that as the defendant called a witness by whom he attempted to prove the fraud, and as that witness denied it, the defendant was bound by that denial, in the absence of contradiction by some other witness, even though the jury might think some

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parts of the evidence of the witness clearly showed its existence.

To show exactly how the question arose and what was decided by the court, some reference must be made to the testimony, although it will be unnecessary to allude to it all.

The assignor, Exstein, was a merchant engaged in a large business in Buffalo. He kept regular books of account in his business, which were produced upon the trial, and he was called as a witness for the defendant and gave evidence in relation to the books and upon other matters.

His assignment was made on the seventeenth of October, and on the sixteenth of that month he made entries in several accounts which he kept, crediting quite large sums of money to the different persons named in such accounts, the result of which entries was to cause it to appear by the books, that the assignor was in their debt to a somewhat large amount, while, if the entries as of the sixteenth of October were stricken out, it would then appear that the parties instead of being creditors were in reality debtors of the assignor. When on the stand, he substantially stated that if those entries were stricken out, the state of affairs between himself and those persons would be as represented in the books, or in other words, that excluding those entries and the circumstances upon which they rested, some of these persons would be his debtors. He also said that these entries did not, in fact, represent any actual transaction occurring at the time when they were made, and that no valuable or other consideration passed between him and those parties at such time. Stopping with these facts, it would appear then that credits were given these persons the day before the assignment, upon which some of them drew out moneys from him, and upon the basis of which one was made a preferred creditor in the assignment, and yet such entries represented no actual, present transactions happening at the time when they were made.

Unexplained, it would appear that, as a result, Exstein had provided for the payment of large sums of money, or had already, and in view of his assignment, paid such sums to

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persons whom he did not owe, or, in other words, he had paid and also made provision in his assignment for the payment of fictitious debts.

The defendant, however, proceeded with his examination of this witness, and asked for an explanation of these entries, and the facts or circumstances upon which they were based, and the witness proceeded to give it. The explanation was, if true, sufficient in law, and showed that he did owe the persons the amounts he claimed to, with the possible exception of one or two cases in which the defendant claims that even on the basis of the general truth of the explanation, the witness had charged himself in reality with more than he owed. The defendant then rested, and the plaintiffs, with the evidence in this state, asked for a verdict in their favor by the direction of the court, and obtained it.

The court held, in substance, that the books of the witness Exstein showed a *prima facie* case of an indebtedness of the witness in the amounts therein appearing, and to the persons therein mentioned, and the witness said they were correct. He then stated what has already been alluded to as to those entries made on the sixteenth of October, and continued by explaining the facts upon which they were based. This explanation, the court said, was totally uncontradicted by any other witness, and defendant was, therefore, bound by what Exstein said on that subject, for the reason that he could not discredit or impeach him, and must take what he said as, under the circumstances of the case, true.

If that were the true rule, the court was correct in directing a verdict. The General Term, it must be presumed, also took the same view of the case in directing judgment for the plaintiffs, without delivering any written opinion.

The general rule prohibiting the impeachment or discrediting of a witness by the party calling him was extended too far in this case. Here was an issue of fraud in the making of an assignment by the assignor, and the defendant, in order to prove its existence, called the very man as a witness whom he alleged was guilty of the fraud. He might

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well be regarded, therefore, as an adverse witness, whom the party by the exigencies of his case was obliged to call.

With regard to such witnesses it is well settled that all the rules applicable to the examination of other witnesses do not in their strictness apply. An adverse witness may be cross-examined, and leading questions may be put to him by the party calling him, for the very sensible and sufficient reason that he is adverse and that the danger arising from such a mode of examination by the party calling a friendly or unbiassed witness does not exist.

What favorable facts the party calling him obtained from such a witness may be justly regarded as wrung from a reluctant and unwilling man, while those which are unfavorable may be treated by the jury with just that degree of belief which they may think is deserved, considering their nature and the other circumstances of the case.

Starkie, one of the ablest and most philosophical of English writers on this branch of the law, in speaking of a reluctant or adverse witness, uses almost the precise language above stated and which has been substantially quoted from him. (Starkie on Ev. [9th ed.], m. p. 248.) Sometimes rather loose language has been indulged in to the general effect that a party cannot impeach his own witness, but when an examination is made as to the limits of the rule the result will be found to be that it only prohibits this impeachment in three cases, viz.: (1) the calling of witnesses to impeach the general character of the witness; (2), the proof of prior contradictory statements by him; and (3), a contradiction of the witness by another where the only effect is to impeach and not to give any material evidence upon any issue in the case. (*Lawrence v. Barker*, 5 Wend. 301-305; *People v. Safford*, 5 Den. 112; *Thompson v. Blanchard*, 4 N. Y. 303-311; *Coulter v. Express Co.*, 56 N. Y. 585; 2 Starkie on Ev. [9 Am. ed.], m. p. 244-250; 2 Phil. on Ev. [C. and H. & Ed. notes], m. p. 981, 982, 983 and note 602; 1 Green on Ev., § 442.) In regard to the first class the rule has been stated to rest upon the theory that when a party calls a witness he pre-

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sents him to the jury as worthy of belief, and to allow him to call witnesses thereafter to impeach his general character as a man, would be to permit an experiment to be made upon the jury by producing a person as worthy of belief (whom he knows and has witnesses to prove to be the contrary), and if his evidence be favorable, to get the benefit of it, and if the reverse, to overwhelm it by the impeaching witnesses.

In such a case as this, however, there is no deception. The defendant calls the very man he accuses of the fraud as a witness to prove it and says, in effect, to the jury, that such evidence as the witness gives which tends to show the perpetration of the fraud alleged is forced from him by the exigencies of the case and the surrounding facts which cannot be denied, while that which he gives that looks towards an explanation of the fraud the jury shall give such faith to as under all the facts in the case they may think it entitled to.

As to the second class, in which an impeachment is forbidden, the authorities in England were in conflict, many of the judges thinking it allowable to prove prior contradictory statements by a witness, but the weight of authority was against it, thereby creating the occasion for an interference by the legislature with the law of evidence, which passed an act permitting just such evidence under certain restrictions. (See C. L. Pro. act of 1854, 17 and 18 Vic., chap. 125, § 22.) The non-admissibility of such evidence in the courts of this State is, of course, not open to discussion. It is alluded to only to show the opinion of the English Parliament (in matters of this nature almost exclusively guided by lawyers), upon this question of impeaching one's own witness, and the readiness of that body to alter the law of evidence in the direction of what seemed to it greater opportunity of ascertaining and administering that for which all courts are instituted, viz., truth and justice.

The third of above classes, where no impeachment is allowed, is plainly set forth in several of the cases and textbooks above cited.

It is not admissible, even in the case of a witness called by the other side, to impeach him by proof of prior contradictory

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statements on immaterial or collateral issues, and there is not much difference in the two cases, and, therefore, no reason why it should be allowed with reference to one's own witness. But all the cases concur in the right of a party to contradict his own witness by calling witnesses to prove a fact (material to the issue) to be otherwise than as sworn to by him, even when the necessary effect is to impeach him.

Why should not the right exist to show that a portion of the evidence of your own witness is untrue, by comparing it with another portion of the evidence of the same witness and with the other facts in the case?

The courts below say, in effect, that although a portion of Exstein's evidence shows that he provided for payment in his assignment for fictitious debts, yet the other portion of his evidence (if believed) shows that such debts were not fictitious, and although the defendant was at liberty to call other witnesses to prove that the explanation was false, yet as he did not do so, the explanation must stand as matter of law, and he cannot be heard to contend that it is proved false by its own absolute and inherent improbability. We do not believe, at least in such a case as this, that the rule goes to any such length.

The plaintiffs cite the case of *Branch v. Levy* (46 Sup'r Ct. Rep. 428) as upholding the rule laid down by the trial court. The plaintiffs there brought an action to recover damages from defendants for the non-delivery of coupons bought from defendants' agent, as plaintiffs claimed, but defendants denied the agency and alleged they had sold the coupons to the person whom plaintiffs alleged was their agent, and had no liability for his subsequent acts. On the trial the plaintiffs sustained their claim *prima facie* by certain letters and circumstances, which, as the court said, in the absence of explanation by defendants, made a question for the jury. The plaintiffs then, for some inexplicable reason, called one of the defendants who swore that the person selling the bonds to the plaintiffs was not the agent of the defendants, but that they had simply sold him the bonds. The court held the plaintiffs concluded by this evidence and

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that they must take it as wholly credible; that credibility could not be divided, and that it was attached to the moral character.

That case comes very near the one under discussion, and it is hard to see why the plaintiffs should not have been allowed to go to the jury upon the whole of their case, letters, documents and explanation, and why they should not have been allowed to ask the jury to believe the documents and letters and reject the explanation as in their judgment untrue. To say that credibility is a part of the moral character and indivisible, is to run counter to the well-established rule as to adverse witnesses above referred to, whose testimony you may ask a jury to believe in part and to disbelieve the residue. The case ought not to be followed.

It is a good general rule that the credibility of a witness is matter for the jury, and the fewer technical obstructions there are to the practical operation of that rule the better.

We think that the whole evidence of Exstein in this case should have been submitted to the jury for them to pass upon its credibility, and that they were at liberty to believe that portion which tended to show the debts to be fictitious and to disbelieve the explanation, or that they might regard it as sufficient, just as in their judgment, intelligently and honestly exercised, they might determine.

Of course we do not mean by this decision to give any intimation as to which view should be taken by the jury, we only decide that it was a question for them and not the court.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

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ROBERT FUREY et al., Appellants, v. THE TOWN OF GRAVESEND
et al., Respondents.

By the act of 1883 (Chap. 458, Laws of 1883), in reference to "the common lands of the town of Gravesend," the care, management and control of said lands are vested in the supervisors of the town, and the trustees chosen as specified therein, and it is provided, that they "shall not have power to sell or give title to any lands of the town," with certain exceptions. As to the lands excepted they are authorized to sell "to the present lessees in possession of the same," provided the sale be confirmed by resolution at the annual town meeting. In an action by former lessees of one of the excepted lots, whose lease had expired, to restrain a sale of the lot to a third person, *held*, that the act operated as a mere license and authority to the board so constituted to sell, in their discretion, to the lessees, but did not obligate them to do so; that a lessee acquired no legal or equitable interest in the land by virtue of its provisions until a contract of sale had been perfected between him and the board, or unless he could show a case entitling him to the exercise of such discretionary power.

At the annual town meeting in said town, in 1871, a resolution was adopted, to the effect that the common lands of the town should thereafter be let on notice at public auction to the highest bidder, and if any lot is let to any person other than the last lessee, the new lessee shall pay the former one "the value of improvements on the property at the expiration of the old lease," which condition shall be specified in the notice of letting. A lease of the land in question was duly executed to plaintiffs, which expired February 1, 1883. The only provision contained therein as to payment for improvements was one substantially as contained in the resolution. The land was not relet. *Held*, that no liability was imposed upon the town by the resolution or the lease, to pay for plaintiffs' improvements, or to lease the land again, and no absolute liability in reference thereto, except that of specifying the new lessee's liability in the notice to be given for leasing, in case it was determined to lease again, which specification could not be construed as anything more than a covenant that the town would take measures to cause the new tenant to pay for the improvements; that, as there had been no new lease, no breach had occurred; the town was entirely at liberty to refuse to lease again, and to dispose of the lands otherwise according to its discretion.

After the expiration of plaintiffs' lease the town brought an action of ejectment against them, wherein judgment was rendered in favor of the town. *Held*, that said judgment was conclusive against any claim on the part of plaintiffs to any right of possession in the land in ques-

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tion antedating its rendition, either to compel satisfaction by the town of their claim for improvements or for any other purpose.

Accordingly *held*, that even if said statute created an absolute prohibition upon the board from selling and conveying the land, as plaintiffs had no interest, and were not residents of the town, they could not enforce such prohibition.

(Argued January 25, 1887; decided March 1, 1887.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made September 21, 1885, which reversed a judgment in favor of plaintiffs, entered upon a decision of the court on trial at special term, and vacated an injunction granted herein.

This action was brought to restrain defendants, the town of Gravesend and the trustees of the common lands of the town, from selling, or disposing of certain of said lands except to plaintiffs.

On the 4th day of April, 1871, a resolution was adopted by the electors of the town, at the annual town meeting then held, as follows: "*Resolved*, that the common land of the town of Gravesend on Coney Island, shall hereafter be let only at public auction, on the premises to be let, or at the town house in the town, to the highest bidder, in parcels not more than three hundred feet each (excepting Coney Island Point, which may be let in one parcel as at present), on notice specifying the time and place of letting, and describing the premises to be let, which said notice shall be published in the Brooklyn Daily Eagle and Union each, and in each week for four weeks immediately prior to each letting.

"No lot shall be let at a time more than one year prior to the expiration of any lease thereon, and not let for a longer period than ten years. If any lot be so let to any person other than the last lessee owning improvements on said lot, the new lessee shall pay the former lessee for the value of improvements on the property at the expiration of the old lease, (provided such improvements were on the property at the time of said public letting), at a rate to be fixed by arbitration between the old and new lessee, each choosing one arbitrator,

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and which said arbitrators shall on disagreement choose a third, and the decision of such arbitrators, or a majority of whom, shall be final ; and the above conditions shall be specified in the notice above provided for whenever there are improvements on the premises so to be let."

On the 12th day of April, 1878, it was resolved by the electors of the town, at a regular town meeting in the same manner, that the resolution of April 4, 1871, be amended by adding thereto the following: "The commissioners of common lands are also authorized to renew any existing lease or leases of common lands belonging to said town of Gravesend upon such terms as they may deem most advantageous for said town."

On the 20th day of December, 1872, the town of Gravesend, through its commissioners, executed and delivered to the plaintiff Robert Furey, a lease of the parcels of the common lands of the town known as lots numbers fifty-one, fifty-two, fifty-three, fifty-four, fifty-five, fifty-six and Coney Island Point, for a term of ten years commencing February 1, 1873, and ending February 1, 1883.

The lessee entered into possession under that lease and purchased the improvements then on the premises, and has since increased the betterments by a large outlay. The plaintiff Thomas F. White became a joint owner in the lease during the lifetime thereof. In July, 1883, after the expiration of the lease to Furey, an action of ejectment was commenced in favor of the town against these plaintiffs and others for the recovery of the premises. That action came to trial in February, 1884, and the plaintiff obtained a judgment for the immediate recovery of the possession of the premises. On the 22d day of May, 1883, an act was passed in relation to the common lands of said town (chap. 458, Laws 1883), the provisions whereof, so far as material, are stated in the opinion.

The plaintiffs brought this action in March, 1885, alleging that the trustees of the town have received a proposition for the purchase of the premises in question from William Zeigler, which they have considered and which they deem for the

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interest of the town to accept, and that they have called a town meeting of the electors of the town to pass on the proposition, and they pray for an injunction restraining the trustees from proceeding with the notice, or the town meeting, or selling or conveying the lands.

Further facts are stated in the opinion.

William C. De Witt for appellants. The lands in suit were plainly withdrawn and exempted from the mode of sale established by section 3 of chapter 458 of the Laws of 1883, by the exceptive and special provisions contained therein, respecting such lands in their relation to the plaintiffs; and as the defendants were attempting the sale in the manner thus interdicted, they were properly enjoined at the suit of the parties in whose behalf the legislature had passed the prohibitory provisions. (*In re Methodist Church*, 66 N. Y. 395; *Potter's Dwarris on Stat.* 118; *In re N. Y. & B'klyn B'dge*, 72 N. Y. 517; *In re Webb*, 24 How. Pr. 249; *Tonnele v. Hall*, 4 Const. 140; *People v. Manhattan*, 84 N. Y. 565.) The plaintiffs have appropriate standing to maintain this action in a court of equity. (*A. & P. Tel. Co. v. B. & O. R. R. Co.*, 46 Sup. (J. & S.) 377; *Gravesend v. Curtis*, 34 How. Pr. 261; *Depau v. Moses*, 3 Johns. Ch. 349; *Graham v. James*, 7 Robt. 468; *Town v. Needham*, 3 Paige 545, 555; *Wendell v. Van Rensselaer*, 1 John. Ch. 344, 353; *Corkhill v. Landers*, 44 Barb. 228; *Brown v. Brown*, 30 N. Y. 541.)

William J. Gaynor for respondents. Plaintiffs have no standing in court to maintain this action. They have not shown that they are aggrieved or concerned in any way. (*Ins. Co. v. Stevens*, 101 N. Y. 411.) The judgment in ejectment between the town of Gravesend and the plaintiffs is conclusive of the question of the plaintiffs' ownership of any improvements on this land. (*Doak v. Wiswell*, 33 Me. 356; *Wells on Res Adjudicata* § 261.)

Per Curiam. We are of the opinion that the complaint in this action, shows no such interest in the lands which are the

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subject of the dispute, as entitles the plaintiffs to the relief demanded, or the injunction awarded them by the trial court. The judgment rendered there, awarded to the plaintiffs a perpetual injunction, against the town from selling or conveying to one William Ziegler, certain lands owned by it.

No affirmative relief in respect to such lands was demanded in the complaint, or claimed on the trial, and the entire extent of the plaintiffs' claim, was an absolute and arbitrary right to prevent the defendant forever, from disposing of the lands in question except to the plaintiffs. There was no question made in the case but that the defendants are the owners in fee of the land in question, and entitled to its possession, nor claim made on the part of the plaintiffs, that they are entitled to its use, enjoyment or possession.

The only foundation for the action rests upon the claim that the plaintiffs have an equitable demand against some one, to be paid the value of certain erections formerly made by them upon the land in question, and which they omitted to remove therefrom, when the term of their tenancy expired. The pleadings seem to found this right, upon the provisions of chapter 458 of the Laws of 1883, which, so far as they affect this controversy, are substantially as follows: "The care, management and control of the common lands of Gravesend shall be vested in the supervisor of said town and five trustees," to be chosen as therein specified. It further provides "that such trustees shall not have power to sell or give title to any lands of the town of Gravesend, or to release or discharge any title or claim of said town thereto, excepting lot numbers 51, 52, 53, 54, 55, 56 and Coney Island Point, which premises are now in possession of lessees of said town."

The act then proceeds to prescribe the manner in which the lands of said town, other than those excepted, may be disposed of by said town, and as to the excepted lands further enacts as follows: "But the said supervisor and trustees shall have power and are hereby authorized to sell said lots number fifty-one to fifty-six, inclusive, of said common lands and Coney Island Point, to the present lessees in possession of the

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same, provided such sale shall be ratified and confirmed by resolution duly passed at an annual town meeting, or at a special town meeting to be called for the purpose, such sale to be upon the same terms of payment provided for sale of other lands of said town."

In giving a construction to this act, courts are confined to the language and terms employed by the legislature, and are not at liberty to interpolate phrases and provisions, although otherwise the purpose and intention, of the law making power may seem indefinite, obscure or incomplete.

If they have failed to insert such provisions in the law as will accomplish the result intended, their omission cannot be remedied by construction, and the law must, to that extent, be considered defective and inoperative.

In so far as any duty is enjoined upon, or power and authority conferred by the act upon the town commissioners, there does not seem to be any ambiguity in its provisions, but the particular object intended to be accomplished by the clauses quoted, is left quite obscure and uncertain. Such commissioners are prohibited from selling or conveying any of the common lands of the town except those in question, and did the provision stop here a strong implication would arise that they had power of their own volition to sell these lands to whomsoever they should elect, but the act then proceeds to prescribe the manner in which, and the persons to whom they are authorized to sell and convey.

No limitation of time is imposed upon the prohibition, or the exercise of the powers or duties, authorized and enjoined by the act, and, so far as its language is concerned, they would seem to be perpetual and irrevocable. Other provisions relate to the mode of disposing of other lands of Gravesend.

It is in the nature of things that the willingness of the contemplated grantees of these lands to purchase, is a condition precedent to the exercise of any power of sale by the supervisor and trustees, and in the absence of any offers by the lessees to buy, the whole provision must fall to the ground as inoperative and unenforceable.

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In this event the lands would remain the property of the town, subject only to the same powers of disposition which apply to its lands generally.

The act operates as a mere license and authority, to the supervisor and trustees to sell and convey such lands according to the prescribed conditions, if they deem it best to do so, but it goes no further. Such board is placed under no obligation to make such sale, but is left entirely at liberty to exercise its discretion upon the subject.

It is quite certain that it could not sell them to the plaintiffs unless they choose to buy, and it is equally certain that the plaintiffs could not acquire either a legal or equitable interest in the lands, under this act until a contract of sale had been perfected between the parties, or the plaintiffs should show some case, entitling them to the exercise of the discretionary power of the commissioners in their favor. The complaint shows no such case. There is no allegation that the town officers have ever refused to sell or convey said lands to the plaintiffs, or that the plaintiffs have ever offered to purchase the same, or even that they have required said town to pay for the improvements made, or that said town has refused to do so, but the right of the plaintiffs seems to be founded upon the operation of the naked statute alone. The effect claimed for the act by the plaintiffs, if it could be upheld, would forever prevent the town from disposing of its land except to the plaintiffs, and would thus practically destroy its power of disposition and the usefulness and value of its property.

Whether any effect can be given to this statute, and if so, what operation it shall have, is a question which it is unnecessary here to discuss. It is enough now to say that the plaintiffs have not, by virtue of its provisions, acquired any interest in the lands in dispute.

A further claim is made by the plaintiffs, founded upon the circumstances under which they became tenants of the town for these lands for the term of ten years from February 1, 1873.

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At the annual town meeting of said town in 1871, the electors thereof adopted a resolution in reference to the manner of leasing their town lands, which read substantially as follows :

Resolved, That the common lands of the town of Gravesend, on Coney Island, shall hereafter be let only at public auction on the premises, or at the town house in this town to the highest bidder "on notice specifying the time and place of letting," etc., and "if any lot be so let to any person other than the last lessee owning improvements on said lot, the new lessee shall pay the former lessee for the value of improvements on the property at the expiration of the old lease," at a rate to be fixed by arbitration, "and the above condition shall be specified in the notice above provided for whenever there are improvements on the premises so to be let."

The plaintiffs claim that this resolution, in connection with the lease subsequently taken by them from the town officers, constituted a covenant on the part of the town for the payment to them, at the expiration of their lease, of the value of the improvements put by them on such leased premises.

No provision for such payment is contained in the lease executed by the town to the plaintiffs; and if any liability exists therefor, it must be such a one as may be implied from the terms of the resolution alone. No express provision relating to the subject is inserted therein except that when such lands are leased to one who was not formerly a lessee thereof, the new lessee shall pay the former one a compensation for existing improvements at a rate provided for. No absolute liability is assumed thereby by the town except the duty of specifying the new lessee's liability in the notice to be given for the leasing of the lands. This could not be construed as anything more than a covenant, that in the event of a further lease, the town would take measures to cause the new tenant to pay the former tenant for improvements.

There is no obligation imposed on the town to lease them again, and it is entirely at liberty, under such a covenant, to refuse to lease again and dispose of the lands otherwise according to its discretion. Even if any covenant could be

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implied, it is quite evident that the condition upon which it is made to depend, of a new lease to another party, has never occurred, and no breach of its obligations could have taken place.

A further difficulty in the way of any claim to an interest in the land, growing out of the resolution of 1871, arises out of the effect of a judgment in an action of ejectment for these lands, brought by the town against these plaintiffs in July 1883, and which resulted in favor of the town in February, 1884, over a year before this action was commenced. This judgment remains unappealed from, and unreversed, and is conclusive against any claim, on the part of the plaintiffs to any right of possession in the lands in question, antedating the rendition of such judgment.

If any right existed in the plaintiffs to retain possession of such lands, to compel the satisfaction by the town of their claim for improvements, or for any other purpose, they were bound to assert it in defense of the action of ejectment, and not having done so, have lost the right to make such a claim in this action.

We have been unable, from any point of view, to discover any right or interest which the plaintiffs have in the lands in question.

Granting, even, that the statute creates an absolute prohibition upon the supervisor and trustees, from selling and conveying these lands in the manner attempted by the town, it does not follow that the plaintiffs are entitled to invoke its enforcement. The right to enforce such prohibition by action can belong only to a party who has some right or interest in the property, which may be prejudiced by the action of the town.

Whoever may be aggrieved, it is quite clear that the plaintiffs were not residents of the town, and have no interest in the subject of the action which is to be affected thereby.

The order should, therefore, be affirmed.

All concur.

Order affirmed.

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THOMAS McCRAITH, Respondent, v. THE NATIONAL MOHAWK VALLEY BANK, Appellant.

D. conveyed certain premises to plaintiff by warranty deed, receiving a mortgage thereon for part of the purchase-money. There were at the time two mortgages on the premises, one owned by defendant. Plaintiff paid the amount of his mortgage before due to defendant, who then held it as collateral security for obligations of D., in consideration of an oral agreement on its part to release the premises from its mortgage, and to procure a release of the other mortgage. It released its own, but did not procure a release of the other, which was subsequently foreclosed and the premises sold. In an action to recover damages for a breach of the agreement, *held*, that it was not within the statute of frauds, as the undertaking of defendant was original, not collateral, nor was it a contract for the sale of lands or an interest therein; also that the contract was not *ultra vires*.

The court charged the rule of damages to be the value of the land at the time of the foreclosure sale, unless from the evidence it could be seen that the promised release could have been procured for a less sum; in which case that would be the measure of damages. *Held*, no error.

(Submitted January 20, 1887; decided March 1, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made September 15, 1885, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

This action was brought to recover damages for an alleged breach of an agreement.

On the 1st day of January, 1876, J. M. Dygert conveyed to plaintiff by warranty deed certain premises for the consideration of \$1,500, in part payment of which plaintiff gave back to Dygert a mortgage of \$1,363.81. There were two prior mortgages on the property, the first one of which was held by the defendant and the other by Myers & Rasbach. The plaintiff, before his mortgage became due and on the 22d of July, 1876, paid the amount thereof to the defendant. The defendant then had possession of the mortgage. The claim of the plaintiff was, and the jury in substance found, that the defendant then had an interest in the mortgage, holding it as collateral security, that plaintiff paid it at the request of

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and on the promise of the defendant, that it would release the premises from defendant's mortgage, and would also procure for plaintiff a release of the other mortgage. The defendant afterward gave to plaintiff a release from its mortgage, but did not procure a release of plaintiff's premises from the other, which was foreclosed and the premises, with others, sold thereon about the 9th of February, 1879. The court charged on the question of damages, in substance, that the rule of damages was the value of the property at the time of the foreclosure sale, except that if from the evidence the jury could see that plaintiff could have procured a release for a less sum than the value, then that sum would be the measure of damages.

Amos H. Prescott for appellant. Every special promise to answer for the debt, default or miscarriage of another person is void. (*Mallory v. Gillett*, 21 N. Y. 412; *Brown v. Weber*, 38 id. 187; *Pfeifer v. Adler*, 37 id. 164; *Duffy v. Wench*, 42 id. 243; *Belknap v. Bender*, 75 id. 446; *Durand v. Curtiss*, 57 id. 7; *Kingsley Balcom*, 4 Barb. 131.) The defendant had no right, authority or power, under its charter, to make any such agreement as was proved in the case; it is in violation of section 8 of the National Currency Act. (*Nat. Bk. of G. v. Wells*, 79 N. Y. 499; *N. Y. S. L. & T. Co. v. Helmer*, 77 id. 64; *Bk. of Gen. v. Bostwick*, 71 id. 161; *Bk. of Roch. v. Pierson*, 31 Am. 341; *Fowler v. Scully*, 72 Penn. 456; *Weckler v. Bk. of Hagerstown*, 20 id. 95.) No action can be maintained to recover back any of the money paid by the plaintiff, because the defendant had never received any of it. (*Pratt v. Short*, 79 N. Y. 437.) The defendant has not reaped the benefits, or had any benefit whatever from any contract with the plaintiff, and a plea of *ultra vires* can be interposed against one who has contracted with it. (*Rider L. Raft Co. v. Roach*, 97 N. Y. 378.)

Smith & Steele for respondent. The undertaking of the defendant was original and not collateral. (*Prime v. Koehler*,

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77 N. Y. 91; *Ely v. McKnight*, 30 How. 97; *Tallman v. Bresler*, 65 Barb. 369; *Allen v. Eighmie*, 14 Hun 559; *Barry v. Ransom*, 12 N. Y. 462; *Sanders v. Gillespie*, 59 id. 250; *Barker v. Bradley*, 42 id. 316; *Mallory v. Gillett*, 21 id. 412.) The claim of the defendant, to retain the money paid by the plaintiff without performance on its part, is condemned by the law as a fraud greater than that which the statute was intended to prevent. (*Ryan v. Dox*, 34 N. Y. 307; *Wheeler v. Reynolds*, 66 id. 227; *Levy v. Brush*, 45 id. 589; *Rice v. Peet*, 15 John. 502; *Gillett v. Maynard*, 5 Johns. 85; *Day v. N. Y. C. R. R. Co.*, 51 N. Y. 583.) The bank had power to make this contract. (*Bk. of Vergennes v. Warren*, 7 Hill, 94.) The bank ratified the acts of its cashier by accepting and appropriating the money and executing the release of its mortgage, and if the defendant now alleges that at the time of making the contract it had no power to perform, or that the contract is *ultra vires*, it is not the plaintiff's fault, and the defendant should refund the money. (Thomas on Mortg. 294.) In this case the covenant was not to pay the mortgage, but to procure a release of it as to the plaintiff's lot, and the consideration has been paid by the covenantee. (*Deyo v. Waggoner*, 19 Johns. 441.)

Per Curiam. There was a conflict of evidence as to the circumstances under which the bank took the plaintiff's mortgage. It was claimed, on the part of the plaintiff, that the bank held it as collateral security for certain obligations held by the bank against Dygert, and, therefore, that it had an interest in the security, when it was paid to the bank by the plaintiff. The bank, on the other hand, insisted that it held the mortgage, simply as the custodian of Dygert, for the simple purpose of receiving payments, which might be made thereon by the plaintiff. This issue was sharply contested, and was found by the jury, against the defendant. So, also, there was a conflict of evidence, as to the verbal agreement, alleged by the plaintiff, to have been made by the defendant, through its cashier, with him, to the effect that if the plaintiff

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would pay the mortgage to the bank, the bank would release its mortgage on the plaintiff's lot, and would also procure for the plaintiff a release of the Rasbach and Myers mortgage. This issue, also, the jury found against the defendant, and in favor of the plaintiff.

The findings of the jury, upon these issues, are not unsupported by evidence, and this court cannot review their decision on the facts. Upon the findings of the jury, there was ample consideration, for the agreement of the bank, to procure a release of the Rasbach and Myers mortgage. It must be assumed that the plaintiff paid his mortgage to the bank before maturity, upon the faith of the promise of the bank. He thereby changed his position, and did what he was under no obligation to do. The agreement was not within the statute of frauds. The undertaking of the bank was original, and not collateral. (*Prime v. Koehler*, 77 N. Y. 91; *Milks v. Rich*, 80 id. 269, and cases cited.) Nor was it a contract for the sale of lands, or of any interest in lands. We are also of opinion that the contract, on the part of the bank, was not *ultra vires*. The bank had an interest in securing payment of its obligations against Dygert. The arrangement with the plaintiff was an ordinary business transaction, and within the usual powers of a business corporation, and, although an agreement by a bank to procure a release of a mortgage held by a third person is not primarily an agreement relating to banking, yet when made to secure payment of a debt due to the bank it cannot be said to be foreign to the purposes, or beyond the powers of the corporation. We think there was no error in the rule of damages. The opinions in the court below are full and quite satisfactory upon all the points involved, and further elaboration is unnecessary.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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194 600GAZENA C. JONES, Respondent, v. IDA V. FLEMING et al.,
Appellants.

In an action to recover dower it appeared that plaintiff, during the life-time of her husband, who had been declared a lunatic, and a committee of his estate appointed, entered into a contract with the committee and the children of her husband, and executed to them a deed, by which, in consideration of the receipt by her of about one-third of her husband's property, she released all interest in his estate, including "her inchoate right of dower (if any exists), of, in and to any and all real estate," and also covenanted at any future time, on demand, to execute all necessary deeds, releases or transfers, to carry out the intention of the parties, "namely, the full and perfect release" of her "inchoate and other rights in the property" of her husband, which she had or might have at the time of the death, and she also covenanted not to make any claim therefor on the death of her husband. *Held*, that plaintiff was not entitled to dower; that there was under the agreement and within the meaning of the Revised Statutes (1 R. S. 741, §§ 12, 13, 14), a pecuniary provision made in lieu of dower; and, as plaintiff had retained that provision and never offered to return it, she must be deemed to have elected to keep it in lieu of dower.

Also *held*, that while the agreement and deed did not operate as a present release of her inchoate right of dower, as under the agreement she received a separate estate, it was obligatory upon her, and she was bound to release her dower; that it was immaterial that defendants did not then own the land in which dower is claimed; that they were competent to make a contract for the benefit of the land when their interest should come into existence.

Jones v. Fleming (37 Hun, 227) reversed.

(Argued January 26, 1887; decided March 1, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made November 10, 1885, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below 37 Hun, 227)

The nature of the action and the material facts are stated in the opinion.

Denis O'Brien for appellants. The plaintiff was not entitled to recover dower in this action. (*Payne v. Becker*, 87 N. Y. 157, Gerard's Titles, 157, 3 N. Y. R. S. [7th ed.] 2197, § 1;

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Cropsey v. Ogden, 11 N. Y. 228; *Amory v. Amory*, 6 Robt. 514; *Smith v. Woodworth*, 44 Barb. 198.) The plaintiff's marriage to Jones would have been void at common law, and also under our statutes prior to the Revised Statutes of 1829. (1 Black's Com. 436; 2 Kent's Com. 80; *Williamson v. Parisien*, 1 Johns. Ch. 389.) The only effect of chapter 24, Laws of 1788 (1 R. L. 113), was to relieve the wife from the penal consequences of bigamy. (*Williamson v. Parisien*, 1 Johns. Ch. 389; *Jackson v. Claw*, 18 Johns. 346; 1 Bishop on Divorce, § 299.) The plaintiff is not entitled to dower, unless the provisions of the Revised Statutes render her subsequent marriage valid, until sentence of nullity shall be passed for all purposes. This can only be done by distinct and positive legislation. (3 R. S. [7th ed.] 2332, §§ 5, 6; 3 R. S. [6th. ed.] 153, §§ 33, 36; Code Civ. Pro., §§ 1743, 1745; *Appleton v. Warner*, 51 Barb. 271; 3 N. Y. R. S. [6th ed.] 154, § 37; *Williamson v. Parisien*, 1 Johns. Ch. 389; 4 Bl. Com. 163; *Jackson v. Claw*, 18 Johns. 346.) The fact that the marriage may be annulled by decree of the court does not give it any validity until decree is made. All the provisions read together result in the conclusion that nothing was intended further than to give the children limited succession to property, and to extend immunity from punishment. (*Spicer v. Spicer*, 16 Abb. Pr. [N. S.] 112.) As the widow of Firth, plaintiff, at his death, was entitled to dower in his estate, and this is so, notwithstanding she might not have obtained a divorce for his adultery. (*Wait v. Wait*, 4 N. Y. 95; *Van Voorhis v. Brintnall*, 23 Hun, 263, 86 N. Y. 18; *Savage v. Crill*, 19 Hun, 4; *Schiffer v. Pruden*, 7 J. & S. 167, 174; *Pitts v. Pitts*, 52 N. Y. 593.) An inchoate right of dower is a subsisting and valuable interest possessing a pecuniary value which is susceptible of estimation. Although it is not complete or consummated until the death of the husband, it is, nevertheless, a present, certain and vested interest. (*Steele v. Ward*, 30 Hun, 555; *Simar v. Canaday*, 53 N. Y. 298; *Doty v. Baker*, 11 Hun, 222; *Garlock v. Strong*, 3 Paige, 440; *Young v. Carter*, 1 Abb. [N. C.]

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136, note, *Pomeroy v Pomeroy*, 54 How. Pr. 228; *Witthaus v. Shack*, 24 id. 328; *Douglas v. Douglas*, 11 id. 406; *Babcock v. Babcock*, 53 How. Pr. 97, *Mathews v. Duryea*, 4 Keyes, 525; *Mills v Van Voorhies*, 20 N. Y. 412; *Payne v. Becker*, 87 id. 153, *Pope v. Meade*, 99 id. 201; *Youngs v. Carter*, 10 Hun, 194, *Foster v. Foster*, 5 id. 557; *Strong v. Clem*, 12 Ind. 37, *Potter v. Everett*, 7 Ire. Eq. Cas. [N. C.] 152; *Cornell v. Wilson*, 21 Ark. 62; *Jackaway v. McGarrat*, id. 347.) It is not such a present interest before his death as is the subject of a conveyance, because it does not ripen into an estate until that event takes place. (*Marvin v. Smith*, 46 N. Y. 571, 575; *Hammond v. Pennock*, 61 id. 158; *Elmendorf v. Lockwood*, 57 id. 322, 325, 330, *Malloney v. Horan*, 49 id. 112, 119, *Merch. Bk. v. Thomson*, 55 id. 8; *Gilligan v. Swift*, 7 Week Dig. 116; *Croach v. Ingraham*, 13 Pick. 23, *Thompkins v. Fonda*, 4 Paige, 448; *Savage v. Crill*, 19 Hun, 4; 80 N. Y. 630; *Chicago D. Co. v. McKinzie*, 49 Ill. 289, 294; 1 Wash. on Real Property [4th ed.] 307; *Harriman v. Gray*, 49 Me. 537; *Robinson v. Bates*, 3 Met. 40, *Pawley v. Bennett*, 11 Mass. 298; *Stover v. Eycleshimer*, 3 Keyes, 620; 46 Barb. 84; 2 Story's Eq. § 1040 b; *Field v. Mayor, etc.*, 6 N. Y. 179, *Johnson v. Williams*, 63 How. Pr. 233; 2 Spencer's Eq. 852, 853, 854, 855; Fonblanque's Eq. 213; *Lawrence v. Bayard*, 7 Paige, 70; *Buckley v. Newland*, 2 P. Wms. 182; *Hobson v. Trevor*, id. 191; *Hyde v. White*, 5 Simons, 524; *Howard v. Took*, 2 id. 182; *Lyde v. Winn*, 1 M. & K. 683; 3 Pomeroy's Eq. § 1287; *Miller v. Emans*, 19 N. Y. 384.) The heirs of Jones were the interested parties, and as the transaction was between them and plaintiff the estoppel was mutual. (*Fitzgerald v. Quann*, 33 Hun, 655; Brown's Legal Maxims [5th ed.] 133 M. 118.) This action was properly brought in the name of Jones, by his committee, under the direction of the court. (3 R. S. [6th ed.] 449; Code Civ. Pro., §§ 449, 1745; Laws of 1845, chap. 112, § 2; *McKillip v. McKillip*, 8 Barb. 552; *Burnett v. Bookstaver*, 10 Hun, 481; *Lane v. Schermerhorn*, 1 Hill, 97; *Petrie v. Shoemaker*, 24 Wend. 85, *Field v. Fowler*, 2

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Hun, 400; *Perry v. Perry*, 2 Paige, 501; *Wightman v. Wightman*, 4 Johns. Ch. 343; *Ferlat v. Gojon*, 1 Hopk. 478; *Portsmouth v. Portsmouth*, 3 Eng. Ecc. 154; 1 Hagg. 335; *Parnell v. Parnell*, 2 id. [Consistory Rep.] 169; *Morrison v. Morrison*, Ct. of Arches, 1745; *Frost v. Bowerman*, id. Feb'y 22 [1790]; *Crump v. Morgan*, 3 Ir. [N. C.] Eq. 91; *Brown v. Westbrook*, 27 Ga. 102; *Mims v. Mims*, 33 Ala. 98; Shelford on Lun. 448, 449, 456; 2 Bish. on Mar. & Div. § 307; *Mordaunt v. Mordaunt*, 2 L. R. [P. & D.] 109; *Hancock v. Peaty*, 1 L. R. 335; *Appleton v. Warner*, 51 Barb. 270; *Savage v. Crill*, 19 Hun, 4, 80 N. Y. 630.) If the release of dower executed by plaintiff was not effective, as such, she was estopped by her covenants from claiming dower. (*Miller v. Emans*, 19 N. Y. 385, 390; *Moore v. Littell*, 41 id. 66; *Sedgwick v. Stanton*, 14 id. 289; *Durgin v. Ireland*, id. 322; *Zogbaum v. Parker*, 66 Barb. 341, 344; *Fowler v. Callan*, 4 Civ. Pro. Rep. 413; *Sparrow v. Kingman*, 1 N. Y. 246, 247; *Esterbrook v. Savage*, 21 Hun, 153; *Jackson v. Murray*, 12 Johns. 202; *Jackson v. Bull*, 1 Johns. Cas. 81; *Teft v. Munson*, 57 N. Y. 97; *House v. McCormick*, 57 id. 311; *Pelletreau v. Jackson*, 11 Wend. 120, 121; *Stover v. Eycle-shimer*, 3 Keyes, 620; 46 Barb. 84, *Austin v. Ahearn*, 61 N. Y. 7; *Jackson v. Van Derheyden*, 17 Johns. 167; *Marvin v. Smith*, 46 N. Y. 574, 575, *Anderson v. Mather*, 44 id. 250; *Bodine v. Killeen*, 53 id. 93; *Penn. Coal Co. v. Blake*, 85 id. 227; *Duigens v. Clancy*, 67 Barb. 566; *Treman v. Allen*, 15 Hun, 550; S. C. 84 N. Y. 354; *Hensler v. Seffrin*, 19 Hun, 564; *Whyton v. Snyder*, 88 N. Y. 299; *Cashman v. Henry*, 75 id. 103; *Tiemeyer v. Turnquist*, 85 id. 516; *Harrington v. Robertson*, 71 id. 280; *Ackley v. Westervelt*, 86 id. 448; Bigelow on Estoppel [2d ed.] 387; *Cox v. James*, 45 N. Y. 558; *Cook v. Holt*, 48 id. 275; *Vosburg v. Huntington*, 15 Abb. Pr. 254; *Jackson v. Hotchkiss*, 6 Cowen, 401; *Jackson v. Spear*, 7 Wend. 401; *Marie v. Garrison*, 13 Abb. [N. C.] 210, 309; Hermons Law of Estoppel, § 338; *McMicken v. Perrie*, 18 U. S. 507.) Post-nuptial agreements between husband and wife, though void at law, will be enforced in

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equity. (*Foster v. Foster*, 5 Hun, 557; *Shepard v. Shepard*, 7 John, Ch. 57; 2 Story's Eq., §§ 1368, 1372; *Mahon v. Smith*, 60 How. Pr. 385; *Syracuse Plow Co. v. Wing*, 20 Hun, 206; S. C. 85 N. Y. 421; *Calkins v. Long*, 22 Barb. 97; *Wallace v. Bassett*, 41 id. 92; *Magee v. Magee*, 67 id. 487; *Allen v. Offerell*, 64 How. Pr. 380; *Carson v. Murray*, 3 Paige, 483; *Reed v. Gannon*, 50 N. Y. 345; *Dupre v. Rein*, 7 Abb [N. C.] 256; *Desbrough v. Desbrough*, 29 Hun, 593; *Baker v. Barney*, 8 Johns. 72; *Shelthar v. Gregory*, 2 Wend. 422; *Mercein v. People*, 25 id. 100; *Allen v. Affleck*, 64 How. Pr. 380; *Thomas v. Brown*, 10 Ohio St. 247; *Garlick v. Strong*, 3 Paige, 440; *Evans v. Evans*, 3 Yeates [Penn.] 507; *Campbell v. Hammett*, 2 Week. Dig. 204; *Day v. West*, 2 Edw. Ch. 594; *Townsend v. Townsend*, 2 Sand. 713, 714; *Livingston v. Livingston*, 2 Johns. Ch. 537; *Carson v. Murray*, 3 Paige, 483.) If an agreement to release dower is fairly made and acted upon, equity will treat it as valid, or hold the party asserting the right estopped, for the purpose of preventing injustice. (*Dunlap v. Thomas*, 28 N. W. Rep. 637; *Nelson v. Holly*, 50 Ala. 3; *Johnson v. Montgomery*, 51 Ill. 185, *Farron v. Farron*, 1 Del. Ch. 457; *Yaney v. Smith*, 2 Metc. [Ky.] 408; *Grant v. Parkham*, 15 Vt. 649; *Simpson's App.*, 8 Penn. St. 199.) The transaction was, in effect, an agreement to sell and transfer to the defendants when they should become the owners of the property, any right of dower that the plaintiff should then have in the property as such, it was a valid contract and may be enforced against the plaintiff. (*Cashman v. Henry*, 75 N. Y. 103; *Crisfield v. Banks*, 24 Hun, 159; *Tiemeyer v. Turnquist*, 85 N. Y. 516; *Martin v. Roberts*, 30 Hun, 255; *Williamson v. Duffy*, 19 id. 312, *Harrington v. Robertson*, 71 N. Y. 280; *Speck v. Gurnee*, 25 Hun, 644; *Prevot v. Lawrence*, 51 N. Y. 219; *Ackley v. Westervelt*, 86 id. 448; *Sar. Co. Bk. v. Pruyn*, 90 id. 250; *Whiton v. Snyder*, 88 id. 299; *Muller v. Platt*, 31 Hun, 121; *Vrooman v. Turner*, 8 id. 78; *Willsey v. Hutchins*, 10 id. 502; *Scott v. Otis*, 25 id. 33; *Anderson v. Mather*, 44

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N. Y. 250; *Bodine v. Killeen*, 53 id. 93; *Harrington v. Robertson*, 71 id. 280; *Payne v. Becker*, 87 id. 153; *Pope v. Mead*, 99 id. 201; *Strong v. Clem*, 12 Ind. 39; *Potter v. Everett*, 7 Ire. Eq. Cas. [N. C.] 152; *Cornell v. Wilson*, 21 Ark. 62; *Jackaway v. McGarratt*, id. 347; *Stover v. Eycleshimer*, 3 Keyes, 620; *S. C.*, 46 Barb. 84; 2 Story's Eq. § 1040 *b*; Fonblanque's Eq. 213; 3 Pomeroy's Eq. § 1287; 2 Spence's Eq. 852. 853, 854, 865; *Lawrence v. Bayard*, 7 Paige 70; *Field v. Mayor, etc.*, 6 N. Y. 179; *Johnson v. Williams*, 63 How. Pr. 233; *Miller v. Emans*, 19 N. Y. 384; 4 Kent's Com. 261; 3 R. S. [7th Ed.] 2175, 2176, 2178, §§ 9, 10, 11, 13, 35; *Freeman v. Freeman*, 43 N. Y. 34; *Favill v. Roberts*, 50 id. 222; *Crary v. Smith*, 2 id. 60; *Parsell v. Stryker*, 41 id. 480; *Sherman v. Scott*, 27 Hun, 331; *Bennett v. Abrams*, 41 Barb. 619; *Williston v. Williston*, id. 635; *Vianey v. Ferran*, 54 id. 530, *McClusky v. Mayor, etc.* 64 id. 310; *Johnson v. Brooks*, 93 N. Y. 337; *Post v. Bernheimer*, 31 Hun, 248; *Countryman v. Deck*, 13 Abb. [N. C.] 110; *Brown v. Haff*, 5 Paige, 235; *Losee v. Morey*, 57 Barb. 561; *Schroepfel v. Hoffer*, 40 id. 425; *Wheeler v. Reynolds*, 66 N. Y. 227; *Miller v. Ball*, 64 id. 286; *Benedict v. Phelps*, 2 W'ky Dig. 150.) Under the circumstances of this case the marriage between plaintiff and Jones was, at best, voidable at the election of either party, and what was done amounted to such election. (1 Bishop on Mar. and Div. 299, §§ 6-9; *Clayton v. Wardell*, 4 N. Y. 238; 3 R. S. [7th ed.] 2331, § 1; *Amory v. Amory*, 6 Robt. 515; *Lincoln v. Lincoln*, id. 525; *Crepsey v. Ogden*, 11 N. Y. 228; *Patterson v. Gaines*, 6 How. [U. S.] 550; *Smith v. Woodworth*, 44 Barb. 198; *Appleton v. Warner*, 51 id. 270.) A person seeking to rescind a contract must restore what has been received under it. (*Cobb v. Hatfield*, 46 N. Y. 533; *Gould v. Cayuga Co. Bk.*, 86 id. 75; *Dodge v. Fearey*, 19 Hun, 277; *Sinclair v. Neill*, 1 id. 80; *Baker v. Lever*, 5 id. 114; *Farrell v. Corbett*, 4 id. 128; *Dows v. Griswold*, id. 550; *Masson v. Bovet*, 1 Den. 69; *Allen v. Affleck*, 64 How. Pr. 380; *King v. Brown*, 2

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Hill, 485; *Lockwood v. Barnes*, 3 id. 128, *Nones v. Homer*, 2 Hilt. 116.) A set-off will always be decreed in equity when necessary for the purpose of preventing injustice. (*Jordan v. Nat. S. & L Bk.*, 74 N. Y. 467, 473, 476; *Coffin v. McLean*, 80 id. 560, 564; *Smith v. Fulton*, 43 id. 419; *Stillnoell v. Carpenter*, 2 Abb. [N. C.], 242, 269; *Davidson v. Alfuro*, 80 N. Y. 660; *Hatch v. Mayor, etc.*, 82 id. 436, 442; *Gay v. Gay*, 10 Paige, 370; *Sutphen v. Fowler*, 9 id. 280; *Bathgate v. Haskins*, 59 N. Y. 533; *Lindsay v. Jackson*, 2 Paige, 581.)

Elon R. Brown for respondent. The plaintiff in this case is within the provisions of the statute relating to marriage during the absence of a living husband or wife, and the status thus acquired endows her in the lands of her second husband. (3 R. S. [7th ed.] 2332, § 6; *Cropsey McKinney*, 30 Barb. 47; *Griffin v. Banks*, 24 How, 215; 37 N. Y., 621; *McCarter v. Camel*, 1 Barb. Ch. 463; *Sheldon v. Ferris*, 45 id. 124; *McComb v. Wright*, 5 Johns. Ch. 264; *Vallean v. Vallean*, 6 Paige, 207; *Eagle v. Emmett*, 4 Brad. 117, 121; *Jackson v. Boneham*, 15 Johns. 226; *King v. Paddock*, 18 id. 141; *Jones v. Zoller*, 29 Hun, 551; 32 id. 280.) The contract of marriage, if made in good faith under the circumstances specified in the statute, carries dower as an incident of such marriage. (*Price v. Price*, 33 Hun, 76; 1 Bish. Mar. and Div., § 114; 4 Kent's Com. 36, and notes; 1 Greenl. Cruise, 155; 1 Hilliard [4th ed.] 138, § 7.) The release of the plaintiff's inchoate right of dower during the lifetime of her husband does not operate as a bar to her recovery in this action. (*Maloney v. Horan*, 49 N. Y., 111, 113; *Elmendorf v. Lockwood*, 57 id. 325; *Mason v. Mason*, 1 N. E. Rep'r, 106; S. C., 21 Cent. L. J. 521; *Guidet v. Brown*, 54 How. Pr. 409; *Townsend v. Townsend*, 2 Sand. S. Ct. 711; *Day v. West*, 2 Edw. Ch. 592; *Carson v. Murray*, 3 Paige, 483, 503; *Crain v. Cavanna*, 36 Barb. 410; *Marvin v. Smith*, 46 N. Y. 571, 574, 575; *Innis v. Pendleton*, 22 Alb. L. J. 363; *Mason v. Mason*, *supra*.) A married woman cannot bind

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herself or her heirs by estoppel arising upon a deed or upon matter in "*paris*." (*Mason v. Mason*, *supra*; *Dominick v. Michael*, 4 Sand. Sup. Ct. 423; *Mason v. Jordan*, 23 Alb. L. J. 579; *Douglas v. Cruger*, 80 N. Y. 15, 20; Bigelow on Estoppel, 245; *Jackson v. Vanderheyden*, 17 Johns. 167; *Underhill v. Jackson*, 1 Barb. 73; *Pelletreau v. Jackson*, 11 Wend. 111-119; *Bartle's Petition*, 20 Am. L. Reg. 98.)

EARL, J. The plaintiff commenced this action to recover dower in certain lands mentioned in the complaint, as the widow of James Jones, deceased, against his children and heirs-at-law. The defendants interposed, as a defense to the action, that at the time of plaintiff's marriage with Jones, she had another husband living, and also that she had released, and agreed to release, any dower right which she had in the lands.

Upon the trial, before the referee appointed to hear and determine the action, it appeared that the plaintiff was married to one Firth in 1855; that she lived with him as her husband until 1861, when they broke up housekeeping and never thereafter lived together; that in October, 1875, claiming that Firth had absented himself from her for more than five successive years, without being known to her to be living during all that time, she married Jones, and that he died on the 28th day of October, 1880, seized of the lands in which she claims dower.

The defendants gave evidence, tending to show that Firth had not absented himself within the meaning of the statute (3 R. S. [7th ed.] 2332, § 6), for five successive years, and claimed that her marriage with Jones was therefore null and void. They also offered to prove certain proceedings instituted in the Supreme Court in 1877, for the purpose of having Jones declared a lunatic, and for the appointment of a committee of his person and estate. The records of those proceedings show that the jury summoned for that purpose, found him to be a lunatic since the 15th day of June, 1877, and incapable of the government of himself and the manage-

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ment of his estate; that there was a final order entered February 9, 1878, confirming the inquisition of the jury, and appointing William H. Miller committee of the person and estate of Jones, and that the committee qualified by giving the requisite bond. Those records were objected to by the plaintiff's counsel, as incompetent and immaterial, and were excluded by the referee. The defendants also offered in evidence a petition dated February 15, 1878, by Miller, the committee, addressed to the Supreme Court, which alleged, among other things, that while Jones was a lunatic, he was induced by the plaintiff to deliver to her bonds, notes and other choses in action, amounting in the aggregate to \$9,000; that she afterwards transferred and delivered some portions of the property to divers other persons, and that she had delivered between \$500 and \$1,000 of such property to one Leavitt, who then held the same, and prayed for an order authorizing him to commence an action against the plaintiff to annul her marriage with Jones, and also actions against her and Leavitt and other persons, who might have any of the personal property of Jones in their possession, to recover the same. They also offered in evidence an order of the Supreme Court, made February 25, 1878, authorizing the commencement by the committee of the suits mentioned in the petition; a summons and complaint in an action wherein Jones, by his committee, was plaintiff and this plaintiff was defendant, to annul her marriage with Jones; the answer of the defendant in that action; a summons and complaint in the Supreme Court in an action by Jones by Miller as committee against the present plaintiff, commenced March 1, 1878, which complaint, among other things, alleged that Jones was the owner of personal property of the value of about \$3,000; that his committee was entitled to the possession of the property, and that she declined to deliver the property to the committee and unlawfully detained the same from him, and demanded judgment for the recovery of the property; also the defendant's answer in that action, in which she admitted that she had possession

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of the property, but alleged that it had been given to her by Jones, and that she was the owner thereof; also a summons and complaint in an action in the Supreme Court, by Miller, as committee of Jones against Leavitt, commenced March 15, 1878, which complaint alleged that Jones was the owner of personal property of the value of \$500, which the committee was entitled to the possession of, and that Leavitt had converted the same, and demanded judgment for the value thereof; also the answer of Leavitt, which admitted that he had possession of the property, but alleged that the same had been delivered to him by Mrs. Jones, and that she was the owner thereof; also a summons and complaint in an action in the Supreme Court, by Miller, as committee of Jones against one Standring, commenced March 15, 1878, which complaint alleged that Jones was the owner of personal property of the value of about \$4,000, which the committee was entitled to the possession of; that Standring had possession of the same and declined and refused to deliver the same to the committee, and it demanded judgment for the recovery of the property; and also the answer of Standring, in which he alleged that the property had been left with him by Mrs. Jones for safe-keeping, and that the same was owned by her. The plaintiff objected to all the evidence thus offered as incompetent and immaterial, and the referee sustained the objection.

The defendants then offered in evidence an agreement, dated January 28, 1880, between the plaintiff of the one part, and Ida V. Fleming, Ellen A. Van Ness and Julia E. Zoller, described as the only children and prospective heirs of James Jones, a lunatic, and William H. Miller, committee, of the other part, which recited and stated as follows: "That whereas four suits have been commenced and are now pending in the Supreme Court, brought by said committee against the party of the first part, Mrs. Jones, and against persons representing her claims as follows, to wit: (Here the suits above-mentioned are described), it having been this day agreed between the parties that all of the said actions be discontinued, and the

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same having been discontinued, the said committee and said three daughters of James Jones have stipulated and agreed that of the property involved in said suits the sum of \$3,400 shall be released to and is hereby delivered to said Gazena C. Jones, the receipt whereof is hereby confessed and acknowledged, and a general settlement being made this day between all the parties hereto, now, therefore, in consideration of the premises and of the said \$3,400, duly paid to me, I hereby release, transfer, assign and set over to the said committee and said three daughters of said James Jones, all my right, title and interest, including my inchoate right of dower (if any such exists) of, in and to any and all real estate that said James Jones had on the 12th day of October, 1875, or that he has since acquired, and also of, in and to all his personal estate, and of, in and to any personal estate he may own at his death; the intent being to release all right, inchoate or otherwise, that I have or may have in the estate of said James Jones; and in consideration of the premises and of the said \$3,400, hereby covenant and agree to and with said committee and the three daughters of said James Jones before named, that at any future time, on demand of the parties hereto, I will execute and deliver such further or other deeds, releases or transfers as may be necessary to perfect this arrangement and carry out the intention of the parties thereto, namely, the full and perfect release of all my inchoate or other rights in the property of said James Jones, and I hereby relinquish to said Miller, the committee, all rights that I now have as the committee of the person of said Jones, and agree to give full possession of the house and premises where I now am on Monday, February 2, 1880." This was signed by Mrs. Jones and acknowledged on the same day. The defendants also offered in evidence a quit-claim deed, dated and acknowledged on the same day, from plaintiff to the three children and to Miller, the committee, in which she released to them all her right, title and interest in and to all personal property of Jones, that came into her possession at any time prior to the date of the instrument,

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except such articles as were brought to Jones' house by her, or bought with her own money, and she released, assigned and transferred to them, and their heirs and assigns, all the interest which she had, or might thereafter have, including any inchoate right of dower in any land to which Jones, had title, and she also released to the parties of the second part, any contingent interest in any personal estate which Jones might own at his death, and she covenanted with the parties of the second part not to make any claim therefor on the death of Jones, and that she would, in the future, on demand of any one interested, make such further deeds, conveyances or transfers, as might be necessary to carry out the true intent and object of the parties, namely, to release all rights, inchoate or otherwise, which she had, or might have, in any property which Jones might have at the time of his death, and she acknowledged that the instrument was made as a part of the general settlement, which appeared by the agreement, bearing even date with the deed and signed by her; she also agreed to give up the possession of the house, on and before the Monday following, together with all the appurtenances thereto belonging. The defendants then offered in evidence a stipulation of the respective attorneys in the four actions mentioned in the agreement, discontinuing the same, without costs, as against each other, also dated January 28, 1878. The plaintiff objected to the agreement, the deed and stipulation as immaterial and incompetent, and the referee sustained the objection and excluded the evidence. The defendants then offered to prove that, after the time specified in the inquisition that Jones became a lunatic, the plaintiff wrongfully obtained from him over \$7,000 worth of personal property, a portion of which she transferred to Standing and Leavitt; that an action was brought against her, in the name of Jones, by his committee, to set aside her marriage with Jones; that actions were also brought by the committee of Jones against her, Standing and Leavitt, to recover the personal property so obtained by her from Jones; that during the pendency of those actions a settlement was made between Miller, the committee of Jones.

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and all of the children and prospective heirs of Jones, and the present plaintiff, whereby such actions were all discontinued, and Miller, as such committee of Jones, and the children and prospective heirs of Jones, paid to the plaintiff \$3,400, which constituted upwards of one-third of the real and personal property of Jones; that the plaintiff, in consideration of the same, executed, and delivered the releases and agreements before offered in evidence, and delivered the custody of Jones to the committee, and thereafter never lived with him; that Jones never recovered, and died intestate, and that at the time the plaintiff obtained possession of the personal property he was, in fact, a lunatic. The plaintiff objected to this evidence, as immaterial and incompetent, and upon other grounds. The referee sustained the objection and excluded the evidence. The defendants then offered to prove that Julia E. Zoller, one of the original defendants, since deceased, after the settlement before mentioned, took charge of Jones, her father, and cared for and supported him until his death, on the faith of the settlement. This evidence was also objected to, and the objection was sustained by the referee.

In his report the referee found that the plaintiff's marriage with Jones was valid, and that she was entitled to dower in his estate, and judgment was entered in her favor upon such report, which, upon appeal to the General Term, was affirmed.

Whether the first husband of the plaintiff absented himself, without being known to her, for five successive years, within the meaning of the statute, and whether, assuming that he did so absent himself and the plaintiff was thus lawfully married to Jones, she became entitled to dower in his real estate, her first husband being alive at the time of Jones' death, we do not deem it important to determine, as there are other plain reasons which constrain us to hold that this most inequitable claim for dower should be defeated.

It is provided in the Revised Statutes (3 R. S. [7th ed.] 2198, § 12) that, "if before her coverture, but without her assent, or if, after her coverture lands shall be given or

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assured for the jointure of a wife, or a pecuniary provision be made for her, in lieu of dower, she shall make her election whether she will take such jointure or pecuniary provision, or whether she will be endowed of the lands of her husband, but she shall not be entitled to both."

We must assume that the facts which the defendants offered to prove were true, and must dispose of the case upon that basis. There was, therefore, within the meaning of this section, a pecuniary provision of \$3,400 for the plaintiff in lieu of her dower. While it was not made by her husband, it was made in his behalf by his committee and children. No one has questioned that it was legally made, and while she holds the property she cannot allege that it was not effectually made. This section does not in terms relate to a provision to take effect at the husband's death. Previous to the married women's acts a pecuniary provision in lieu of dower could, during coverture, be made for a wife through the intervention of trustees to take effect during the life of the husband or at his death. The property could be placed in the hands of trustees, so that she could have the benefit and enjoyment of it during coverture, or her enjoyment of it could be postponed until after her husband's death; and in either event, it cannot be doubted that the provision made came within the purview of that statute. Since those acts, the property constituting the provision under this section may be transferred or secured to the wife as her separate estate, and whether the possession and control of the property be at once given to her, or be postponed until her husband's death, it is still in every sense a provision within the meaning of this section.

If by the word "provision" the law makers meant a suitable portion of the husband's estate, or a suitable provision for the maintenance of the wife, or a provision to operate at the husband's death, then all the three conditions are complied with in this case. This provision was a suitable portion of the husband's estate; the property was placed in the absolute control of the wife, and hence could be used for her support

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and maintenance, and must have been so intended ; and as it was given to her in the form of choses in action but a few months before her husband's death, it may be presumed that she had it at his death.

The two following sections of the Revised Statutes must also be noticed. Section 13 provides that "if land be devised to a woman or a pecuniary or other provision be made for her by will in lieu of her dower, she shall make her election whether she will take the lands so devised or the provision so made, or whether she will be endowed of the lands of her husband" Section 14 provides that "when a women shall be entitled to an election under either of the two last sections, she shall be deemed to have elected to take such jointure, devise or pecuniary provision, unless within one year after the death of her husband she shall enter on the lands to be assigned to her for her dower, or commence proceedings for the recovery or assignment thereof" Under these sections the widow may make her election at any time within one year, and if she does not elect to take her dower within one year, she will be deemed to have elected the provision made for her in lieu of dower. But she may elect to take the provision at any time, and when she has done so her right to dower is barred. Here the plaintiff kept the pecuniary provision made for her, has never offered to return it, still has it, and must therefore be deemed to have elected to take and keep it in lieu of dower. She cannot have both the provision and dower ; and, therefore, when she began this action within less than two months after her husband's death, she had already made her election, and her right to dower was gone.

But there is still another reason for barring plaintiff's claim to dower While under the decisions in this State, the agreement and deed of January 28, 1880, could not operate as a present release of plaintiff's inchoate right of dower, yet she was competent to enter into the agreement to execute a valid release of her dower after her husband's death. That agreement was based upon an adequate consideration. Three suits were pending which related to what she claimed to be her

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separate estate, and they were settled and discontinued, and choses in action valued at \$3,400, were transferred to and received by her as her separate estate. Her agreement was therefore one by which she received a separate estate, and related thereto, and therefore was binding upon her under the married women's acts, as has been frequently held in this and other courts of this State. (*Prevot v. Lawrence*, 51 N. Y. 219; *Herrington v. Robertson*, 71 id. 280; *Cashman v. Henry*, 75 id. 103; *Tiemeyer v. Turnquist*, 85 id. 516; *Ackley v. Westervelt*, 86 id. 448.) She received the choses in action in consideration of her agreement to release to these defendants her right of dower after the death of her husband, and her agreement was like the promise of a married woman to pay for property which she purchases for her own use, or adds to her separate estate. It is an immaterial circumstance that the defendants did not then own the land in which dower is now claimed or the property which was transferred to her. They expected to be interested in the land as the heirs of their father, and were perfectly competent to make a contract for the benefit of the land at a future time when their interest should actually come into existence. So, too, while they did not actually own the personal property, they were so situated that they were able to procure a settlement of the suits and the transfer of the property to her; and so, even if the consideration was not at the time detrimental to them, it was beneficial to her, and ample to sustain her agreement based thereon. Certainly, so long as she retains the consideration which the defendants aided in securing to her, she cannot repudiate the agreement for which the consideration was furnished.

We know of no reason why such an agreement should not be enforced because it relates to dower then inchoate, but expected to be complete at the death of the husband when the agreement was to be performed. Such an agreement is condemned by no public policy. A married woman may bar her right to dower by a proper ante-nuptial or post-nuptial agreement, by accepting a provision made for her in a will, or by joining her husband in the conveyance of land in which

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her right of dower is inchoate. It is the policy of the law that a wife shall not be deprived of her dower except by her own consent; but it leaves her absolute freedom in all the ways above-mentioned to bar her dower at her own will and pleasure.

The defendants in their answer, among other things, demanded for relief specific performance by the plaintiff of her agreement to release her dower, and if the evidence erroneously excluded by the referee had been received they would, if necessary for their protection, have been entitled to such relief.

Our conclusion, therefore, is that the judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

FREDERICK E. HUBBELL, an infant by guardian, etc., Respondent, v. THE CITY OF YONKERS, Appellant.

Plaintiff was riding along one of defendant's streets, the road bed of which was thirty feet wide, macadamized and in good condition. On one side, where the street was graded up about twelve feet, there was a sidewalk ten feet wide, separated from the road-bed by a curbstone eight inches high. There was no fence, wall or other obstruction to guard the outer edge of the sidewalk. The horse attached to the wagon in which plaintiff was riding became frightened and commenced to shy, and, spite of the efforts of the driver, went over the curbstone and sidewalk and down the embankment, carrying the wagon and plaintiff with him. In an action to recover damages, for injuries received by plaintiff, it appeared that the street had been in the same condition since its opening, over ten years before, and, so far as appeared, no similar accident had occurred. *Held*, that defendant was not liable, that the accident was one of a class so rare, unexpected and unforeseen, defendant could not be charged with negligence for a failure to guard against it

Kennedy v. Mayor, etc. (73 N. Y. 385), *Macaulay v. Mayor, etc.* (67 id 60:), distinguished.

Also *held*, the principle was not altered by a provision in defendant's charter, giving it power, through its common council, "to compel or

104	434
109	141
104	434
116	483
104	434
125	306
104	434
127	52
104	434
131	453
104	434
142	521
142	570
104	434
148	71
104	434
159	159
104	434
173	76

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cause the making and repairing of railings at exposed places in the streets," that as regards travel on the street this was not an exposed place.

Hubbell v. City of Yonkers (35 Hun, 349), reversed.

(Argued January 27, 1887, decided March 1, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department entered upon an order made February 10, 1885, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial. (Reported below, 35 Hun, 349.)

This action was brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. The material facts are stated in the opinion.

Joseph F. Daly for appellant. There was no proof in this case of negligence on the part of the defendant. (*Moulton v. Town of Sandford*, 51 Me. 127; *Titus v. North Bridge*, 97 Mass. 258; *Horton v. Taunton*, 97 id. 266; *Kennedy v. Mayor, etc.*, 73 N. Y. 368; *Mors v. Burlington*, 80 Ia. 438; 46 Am. Rep. 82.) Even conceding that the fright of the horse had nothing to do with the accident, the defendant, as far as the carriageway was concerned, omitted no duty which made it guilty of negligence. (*Perkins v. Fayette*, 68 Me. 152; *Dougan v. Champlain Trans. Co.*, 56 N. Y. 1; *Cleveland v. N J Steamboat Co.*, 68 id. 306; *Loftus v. Union Ferry Co.*, 84 id. 455; *Ring v. City of Cohoes*, 77 id. 83, 90.) The common council of the city of Yonkers, when it adopted the plans for the construction of this street, and determined that no railing was necessary at the place where the accident occurred, performed a judicial act, and for any error of judgment on the part of the common council, as to what the public safety required, the city of Yonkers is not liable. (*Mills v. City of Brooklyn*, 32 N. Y. 489; *Hines v. Lockport*, 50 id. 236; *Urquhart v. City of Ogdensburgh*, 91 id. 67; *Lansing v. Tooling*, 37 Mich. 152; 16 Alb. L. J. 164; *City of Detroit v. Beekman*, 34 Mich. 125; *Cain v. City of Syracuse*, 95 N. Y. 83.)

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Malcolm F. Keyes for respondent. The provisions of the charter requiring the city to compel or cause the making and repairing of railings at exposed places in the streets are, in legal effect, mandatory, though permissive in form, and made it the duty of the common council to erect, or cause to be erected, a railing along the embankment. (Laws of 1881, chap. 184, tit. 6, § 6, subd. 16; *id.* tit. 7., §§ 1, 2, 3, 14; *id.* tit. 11, § 2; *Hutson v. Mayor, etc.*, 9 N. Y. 193; 1 Kent, 467; 5 Cow. 188; 22 Barb 404; *Hines v. City of Lockport*, 50 N. Y. 236.) It is the duty of municipal corporations to protect exposed places in the street by suitable railings or guards. (*Leyman v. Amherst*, 107 Mass 339; *Britton v. Cummington*, *id.* 347; *Bliss v. Deerfield*, 13 Pick. 102; *Hunt v. Pownal*, 9 Vt. 411; *Gillespie v. City of Newburgh*, 54 N. Y. 468; *Macauley v. Mayor, etc.*, 67 *id.* 602; *Kennedy v. Mayor, etc.*, 73 *id.* 365.) The fact that the accident happened outside of the traveled roadway, and outside of the curb and gutter, does not relieve defendant of liability. (*Hyatt v. Trustees of Rondout*, 44 Barb. 385; *Rice v. Montpelier*, 19 Vt. 470; *Kelsey v. Glover*, 15 *id.* 708; Ang. on High. §§ 262, 295, 297.) A failure to provide safeguards is justly held to be negligence, and the town, village or city in default is liable in damages to one suffering injury from such negligence. (*Conrad v. Village of Ithaca*, 16 N. Y. 158; *Storrs v. City of Utica*, 17 *id.* 104; *Hover v. Barkhoof*, 44 *id.* 113; 2 Dillon, §§ 778, 780, 788, 789.)

PECKHAM, J. The plaintiff sustained an injury by falling over an embankment, while out riding in the city of Yonkers, and recovered damages in the trial court against the city for its negligence in the treatment of the street or highway of the city where the accident occurred. There is substantially no dispute about the facts upon which the defendant's liability is based, and briefly they are as follows: Linden street is a street in the city, running north and south, the road-bed in which was at the time in question macadamized along its entire width of thirty feet and was in good condition. Side-

walks were placed on each side of the road bed, ten feet wide, and separated from it by a curbstone eight inches high. On the west side of the west sidewalk there was an embankment at one point of the street, of about twelve feet deep, running some number of feet along the sidewalk, and not guarded by any fence, wall or other obstruction. It had been in this condition for ten or more years, or ever since the laying out and opening of the street, and, so far as appears in the evidence, the accident in question was the first that had ever happened of such a nature. The accident happened on the 26th of May, 1883, about six o'clock p. m., and while it was daylight. The way in which it occurred may be told in the language of the plaintiff: "On the day of the accident I was going up the street and met my cousins, who were getting ready to take a drive, and as they were going down to the village I thought I would ride rather than walk. They drove south on Waverly street to Park Hill avenue, and then up the hill to Linden street, and when we got along Linden street there was a bicycle came along and the horse became frightened at it and commenced to shy, and in trying to pull him away from there it pulled his head so that the blinds hid the embankment or stone wall, and in so doing he stepped off one foot, and the two young men were on the opposite side from the wall and they had a chance to get out, but I had no chance and I went over, and that was the last I remember until," etc. They were going north, and, consequently, had this embankment on their left. Another witness for the plaintiff makes it, perhaps, a little plainer. He said: "I met a bicycle. I was driving, and my horse commenced to shy off and I tried to pull him on the right side of the street, but in spite of me he crowded off to the left. * * * The other young fellow that was in the wagon with me grabbed hold of the lines and helped me to pull, but we could not pull him to the ——. In spite of us he ran off the bank. He did not run any considerable distance. He just shied right out and went off the bank. It was all very sudden. It was very quick ; it could not be over ten seconds. I was in

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the middle of the wagon, Mr Hubbell on the left side (west side) and Brodt on the east. Brodt jumped out as we went over the curb, and I jumped out as the horse jumped off the walk. Hubbell tried to jump out but did not have time. Horse, wagon and Hubbell all went over the embankment together." In regard to the horse, the last witness said: "I have always driven the horse; he belonged to me. I met bicycles before and he never minded them. The bicycle came upon us suddenly. I saw it not very far ahead. * * * I did not think the horse would run out at all and had no reason to believe that the horse would be frightened at it. Linden street is much traveled, and has been for these years, as far as I know."

Upon this evidence there can be no valid claim of any negligence on the part of the plaintiff, who was a young man of twenty years, nor upon the part of the driver of the wagon.

The only issue in the case arises as to the defendant's negligence. The city is not an insurer of the safety of persons traveling its streets, nor is it bound to furnish an absolutely safe and perfect highway under all circumstances. It is bound to exercise active vigilance towards keeping its streets in proper repair, and still a street may be out of repair and no liability exist against the city therefor, depending upon the question whether the city had failed to exercise that active vigilance, which it was its duty to do. Here was a roadway in first rate condition for its entire width (thirty feet), and bounded on each side by a curb eight inches in height, and then separated from this western embankment by ten feet more of sidewalk. Can it be fairly maintained that there was any lack of that vigilance demanded from a city, in failing to fence this embankment from horses traveling on the road, which should at that particular spot become frightened and unmanageable, and should then rush over the curb-stone and across the sidewalk and jump down this embankment? We think not. We are of opinion that this was one of that class of accidents, whose occurrence is so rare, unexpected and unforeseen, that to hold the city respon-

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sible for a failure to guard against it, is to hold it to a most extensive liability, and to cause it to become substantially an insurer against any accident which human care, skill or foresight could prevent. This is a higher degree of responsibility than the law exacts. The very fact that for ten years or more, this embankment had been in the same condition, and that, so far as appears, no similar accident had occurred, is most cogent evidence of the lack of any negligence on the part of the city in failing to guard this spot. It is upon this principle that several cases have been decided in this court, even with reference to carriers of passengers, in which case the law exacts a higher degree of care than it does in the case of municipal corporations in relation to their highways. That which never happened before, and which in its character is such as not to naturally occur to prudent men, to guard against its happening at all, cannot, when in the course of years it does happen, furnish good ground for a charge of negligence in not foreseeing its possible happening and guarding against that remote contingency. (See, on this subject, *Dougan v. Champlain Transportation Co.*, 56 N. Y. 1; *Cleveland v. Steamboat Co.*, 68 id. 306; *Leftus v. Union Ferry Co.*, 84 id. 455.)

This is unlike the cases of *Kennedy v. Mayor, etc.* (73 N. Y. 365), and *Macauley v. Mayor, etc.* (67 id. 602). In the first case it was very properly argued that the absence of the string piece on the dock, was a plain neglect to do what ordinary prudence would suggest as proper in fulfillment of the duty of the city, to keep the dock in a safe condition, and that its absence was the proximate cause of the injury. This court held that in deciding the question arising upon granting a motion for a nonsuit, it was to be assumed that it was the duty of the city to put a string piece upon the dock, and that it had negligently omitted to perform it, and that there was no negligence on the part of the plaintiff in the management of the horse and cart. This was to be assumed because the evidence upon the question was such as to require its submission to the jury, instead of being passed upon adversely by the court.

The case of Macauley was where the negligence of the defendant caused the fright of the horse, and the fact that the horse was momentarily by fright beyond the control of the driver did not, as matter of law, excuse the defendant's negligence which caused the injury.

In both cases the injury resulted from a cause which the court said might be held by the jury to be the neglect of the defendant to perform its duty, while in this case we cannot see that as to drivers on this street there was any duty to fence this embankment, or that a failure to fence could be construed as negligence on the part of the city, for the reason already given, that an accident of this nature, caused by an unruly or uncontrollable horse, was such a remote and improbable occurrence that negligence could not be founded upon a failure to foresee and guard against it.

The principle is not altered by the special provision contained in the charter of defendant, giving it power through its common council "to compel or cause the making and repairing of railings at exposed places in the streets."

"Exposed places," with reference to such a case as this, must mean "dangerous places," and considering the facts in this case, we do not think this was such a dangerous or exposed place that a failure to guard it with railings could fairly be called negligence.

The cases cited by plaintiff's counsel as to the duty of a town or city to guard the edge of a road passing along a precipice, do not control the decision of this case. Those are cases where the roadway itself runs along such a place and danger from the want of a railing was naturally to be apprehended, while here the roadway was perfectly safe, in first-class condition, bounded by a gutter or curb-stone eight inches high and ten feet of sidewalk, and where no danger from the embankment was possible until the horse should leave the road, drag his wagon over this curb-stone and sidewalk and then fall over the "exposed" place. This could not be done unless voluntarily or by reason of the fright of the horse making him uncontrollable, and as to the latter contingency

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we have already discussed it. The same reasons prevail as to railings on a bridge, for their absence would strike everyone as a plain, if not criminal, neglect of even ordinary care.

We think this accident was such a remote contingency that a failure to guard against it was not negligence, and it was error to submit the question to the jury.

The judgment should be reversed and a new trial ordered, costs to abide the event

All concur except DANFORTH, J., not voting.

Judgment reversed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
R. PORTER LEE et al., Appellants.

While the liability of a guarantor is *strictissimi juris*, and cannot be extended beyond the plain and explicit language of his contract, yet such contract is subject to the same rules of construction as other contracts: it is to be enforced according to the meaning and intent, and in the manner designed by the parties at the time of its execution. Effect must be given to all of the language of the contract, and a meaning and effect ascribed to each word and phrase used therein, if it can be done without violating the plain intent.

Where it clearly appears by a guaranty that it was intended to embrace past as well as future transactions, such an effect will be given to it.

A bank had been for a series of years annually appointed a depository of the State for canal tolls, and had annually executed and delivered to the State a contract, guaranteed by some of its directors in their individual character. Each guaranty recited the designation of the the bank, and its contract to receive and account for the tolls, and the guarantors covenanted jointly and severally that the bank would faithfully perform its contract, account for and pay over all moneys deposited with it, and also "account for and pay over all moneys now on deposit in said bank, or due or to become due therefrom to the people." In an action upon a guaranty so given, *held*, the guarantors were bound for the continuing security of the deposit existing at the time, and so, they were liable for the whole balance due from the bank to the State at the beginning of the year, as well as for subsequent deposits.

Also *held*, that it was not competent for defendants to allege ignorance of the existence, at the time of the execution of the guaranty, of a debt

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so expressly provided for, or that they had been misled by an omission of their principal to notify them of its existence.

It was claimed by defendants that they were released by the acceptance of a new contract and guaranty for the next year. No evidence of actual approval or acceptance was given. It appeared that a few days after the receipt, by the auditor, of the new guaranty, during which time he was diligently engaged in inquiring into the responsibility of the persons proposed as sureties, and had received no satisfactory information, the bank failed. *Held*, that under the circumstances no acceptance could properly be inferred, and that a finding that there was no acceptance was justified.

(Argued January 27, 1887 · decided March 1, 1887.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made the 4th Tuesday of January, 1885, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

This action was brought upon two guaranties, given in 1880 and 1881 to the State, by the First National Bank of Buffalo, to secure deposits of canal tolls.

The guarantees were alike, save in the name of sureties and dates. The defendants executed both. Each was also executed by one person, who did not sign the other. Of the body of the guaranty of 1881 (omitting the names), the following is a copy :

“ *Whereas*, The canal board has designated the First National Bank of Buffalo to receive a part of the deposits of canal tolls collected at Buffalo, N. Y., and the said First National Bank has agreed to receive and account for the same, on the terms and conditions expressed in its contract hereto annexed, bearing even date herewith : Now, therefore, in consideration of the tolls to be deposited in said bank, and of one dollar to us,
* * * in hand paid by the said people of the State of New York, we jointly and severally covenant, promise and agree with the people of the State of New York, that said bank shall well and faithfully do and perform all things contained in said contract, on its part to be done or performed, and shall well and faithfully account for and pay over all moneys deposited with it, or for which it shall in any way

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become liable, in and by said contract, according to the terms and provisions thereof, and that said bank shall account for, and pay over all moneys now in deposit in said bank, or due, or to become due therefrom, to the people of the State of New York."

Eugene H. Lewis for appellants. It is sufficient in order to obtain relief that either party should have entered into a contract under a mistake. Relief will be granted in both cases, but where the mistake is mutual, the remedy is by correction of the contract; where it is unilateral, the remedy is by rescission of it. (Bispham Prin. of Eq., § 189; Pomeroy's Eq. Jur., § 839, note.) Even negligence itself will not operate as a bar to equitable relief in such cases. (Pomeroy's Eq. Jur. § 856; *Kelley v. Solari*, 9 M. & W. 54; *Lucas v. Worwick*, 1 M. & R. 293; *Townsend v. Crowdy*, 8 C. B. [N. S.] 477; *Barber v. Brown*, 1 id. 121; *Dails v. Floyd*, 12 Ad. & L. [N. S.] 531; *Bell v. Gardiner*, 4 M. & Gr 11; *Evans v. Llewellyn*, 2 Brown's Ch. 150; *Bingham v. Bingham*, 1 Ves. Sen. 126; *Broughton v. Hutt*, 3 De G. & Jones, 501; *Smith v. Mackin*, 4 Lans. 41; *Allen v. Mayor, etc.*, 4 E. D. Smith, 404; *Waite v. Leggett*, 8 Cow. 195; *Union Bk. v. Sixth Nat. Bk.*, 43 N. Y. 452; *Duncan v. Berlin*, 46 id. 685; *Lawrence v. Am. Nat. Bk.*, 54 id. 211; *Mayer v. Mayer*, 63 id. 455; *Paine v. Upton*, 87 id. 327; *Wilson v. Randall*, 7 Hun, 15; 67 N. Y. 338.) The sureties upon the guaranties in suit did not become liable for any indebtedness of the bank to the plaintiff beyond that arising from deposits of canal tolls, made during the current years in which the guaranties were respectively given. (*Arlington v. Merricke*, 4 Saund. 411; *Liverpool Water-Works v. Atkinson*, 6 East. 507; *The Wardens v. Bostock*, 2 Bos. & Pul. N. R. 175; *Pearsall v. Summersett*, 4 Taunt. 593, 599; *Haswell v. Long*, 2 M. & S. 363; *Napier v. Bruce*, 8 Cl. & Fin. 470; *Tradesman's Bk. v. Woodward*, Anthon's N. P., 300; *Hurlstone on Bonds*, 33; *Corp. of London Ass'n v. Bold*, 6 Ad. & Ell. [N. S.] 514; ——— v. *Webb*, 6 Ired.

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[N. C.] 57; *Nat. B'king Ass'n v. Conkling*, 90 N. Y. 116; *Mayor, etc. v. Kelley*, 98 id. 476.) It was not, in fact, the intention of the parties that the sureties should become bound for deposits made in preceding years. (*U. S. v. Eckford & Exr's*, 1 How [U. S.] 250; Brandt on Suretyship, §§ 139, 140; *Kingston Mut. Ins. Co. v. Clark*, 33 Barb. 196.) The obligation of the guaranty is printed, the recital is in writing and the written part should prevail. (1 Wait's Act. & Def. 27, 127; 4 id. 21; *Delonguemare v. Tradesmen's Ins. Co.* 2 Hall, 622.) In cases where the rights and liabilities of different sets of sureties intervene, the strict rule of the earlier English decisions has been departed from in New York and other States, and the courts will do equity both to sureties and creditors. (*Seymour v. Van Slyck*, 8 Wend. 420; *People v. Cushing*, 36 Hun, 483.) The referee erred in refusing to find that the bond and guaranty of 1882 were accepted by the plaintiff. (*Postmaster-General v. Norvell*, Gilpin, 106; *Seymour v. Van Slyck*, 8 Wend. 414; 1 Par. on Cont. [7th ed.] 480.) It was not necessary for the auditor to notify either the bank or the sureties upon the guaranty of 1882 of his acceptance of the guaranty before it took effect as a legal obligation. (Brandt on Suretyship and Guaranty, § 164; Wade on Notice, §§ 403, 404, *Douglas v. Howland*, 24 Wend. 35; *Davis v. Wells*, 104 U. S. 159.)

Denis O'Brien, attorney-general, for appellant. The defendants are liable on each bond, not only on the amount deposited during the year, but for the balance on hand at the time each bond was executed, in case of a failure of the bank to account for and pay over the same. (Brandt on Suretyship, 194, § 138; id. 204, § 145; *Mayor, etc. v. Wright*, 16 Add. & Ell. [N. S.] 623; *Dedham Bk. v. Chickering*, 3 Pick. 335; *Bk. of B. N. Am. v. Cuvillier*, 14 Moore's P. C. Cas. 187; *Thompson v. Roberts*, 17 Ir. L. R. 490; *Worcester Bk. v. Reed*, 9 Mass. 267; *Evans v. Earl*, 1 Hurl. & Gur. 1.) The relation of debtor and creditor existed between the bank and the State. There was no application by either party of the

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payments made, and under such circumstances, if payments be made upon the account, the law will apply them upon the oldest item. (*Union Bk. v. Tutt*, 5 Mo. App. 342; *Ward v. Johnson*, 95 Ills. 216; *Johnson v. St. Louis*, 2 Mo. App. 563; *Commercial Bk. v. Hughes*, 17 Wend. 94; *Marsh v. Oneida Central Bk.*, 34 Barb. 298; *Dows v. Merwood*, 10 id. 184; *Allen v. Culver*, 3 Den. 284; *Sheppard v. Steele*, 43 N. Y. 52, 59, 60.)

RUGER, Ch. J. The First National Bank of Buffalo had, prior to 1882, for a series of years, been annually appointed, a depository of the State, for canal tolls receivable in the city of Buffalo, and had annually executed and delivered to the State, contracts regulating the relations between them, the performance of which had been in each year guarantied on the part of the bank, by some of its directors, in their individual capacity.

Early in the season of 1882 said bank became insolvent after it had been appointed a depository, but before it had completed and delivered to the State, satisfactory security for the performance of its obligations for the ensuing year, and after that time the State discontinued its relations with such bank.

Upon its insolvency the bank was found to be indebted to the State in a large sum of money, and the question in this case arises over the liability of its guarantors, for such debt. The complaint embraces the guaranties of both the years of 1880 and 1881, in its allegations, and seeks to recover the balance appearing to be due on the account, at the commencement of the year 1882. These contracts and guaranties were expressed in precisely similar language, and so far as the parties to them are concerned are subject to the same rule of interpretation, and must be understood to have been intended, to cover the same class of obligations, and to differ only in respect to the time of their execution, and the period of time covered by their provisions. Such guaranties are joint and several in character, and it would constitute no defense to an action upon any of them, to

show that there were other persons liable to the State, for the whole or a portion of the same debt, claimed of the defendant, or that such persons are not made parties to the action.

The defendants here are each and all obligors upon the bonds of both 1880 and 1881, and in the view we take of the case it does not enlarge their liability, to consider their situation as parties to the guaranty of 1880. It may be that, as the result of investigation, it will be discovered that other parties liable to the State, for a portion of the money due from the bank, at the time of its insolvency may be found, and, as a consequence flowing from such fact, that the defendants in this action may have a claim for contribution, from such parties, in case they are obliged to pay the whole sum due the State, but it is not perceived how that fact can affect the liability of such guarantors upon their express contract of indemnity.

The only breach of the obligations of the guaranty alleged in the complaint consists of the refusal of the bank to pay the sum claimed to be due from it, by the State on the 20th day of April, 1882, and that amount consisted of the general balance due on the account, accruing through a series of years and covering the operations of 1880, as well as those of 1881.

Whatever, therefore, may be the liabilities or obligations of the parties to the contract and guaranty of 1880, it is entirely immaterial in this action, for the guaranty of 1881 covers not only the transactions of that year, but also the liability resulting from the transactions of 1880, as represented by the balance due from the bank to the State, at the time of the execution of the contract and guaranty of 1881.

If, therefore, it shall appear upon the further examination of the case that the defendants are liable upon the guaranty of 1881, for the whole balance due from the bank to the State, in the spring of 1881, no question arises as to the proper application of payments made by the bank, in the respective years, or as to the equities of the guarantors of the respective years as between themselves. Such rights are to be settled and adjusted in an appropriate action, to

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which all such guarantors are made parties, and where every one interested may be heard in his own behalf, and these claims could not be heard here for want of proper parties, if for no other reason.

This is a simple action at law upon a written instrument for a sum of money claimed to be due to the plaintiff from the parties thereto. If the letter of their contract shows that they have made themselves liable for the sum claimed, it is no defense to show that there are other persons who might also be resorted to by the State for a portion of the same sum.

It is claimed by the appellants that the sureties on the bond of 1881 have been released from liability thereon, by reason of the acceptance by the State, of a contract and guaranty from the bank for the year 1882, and it is contended that such acceptance operated as a discharge of all previous guaranties.

This claim seems to be disposed of by the finding of facts made by the referee. He expressly finds that the State never accepted the same, as a compliance by the bank with the condition imposed upon them, by the State in respect thereto.

The evidence in the case seems to us fully to support this finding, and renders it not only probable, but quite certain that the State authorities did not intend to accept the guaranty in question.

The State could only be bound to such acceptance, by the express action of its officers duly authorized to approve such guaranty, or perhaps their omission to act thereon for such a lapse of time, as would authorize a legal presumption that they intended to approve the guaranty.

During the period between the receipt of the proposed guaranty and the insolvency of the bank, but a few days intervened and the auditor was diligently employed in this time, in inquiring into the responsibility of the persons proposed as sureties, and had received no satisfactory information upon that subject.

Under these circumstances no acceptance of such guaranty could properly be inferred, and no evidence of an actual approval of the guaranty by the State was given. The referee having failed to find that the guaranty of 1882 was received by the State in satisfaction of previous guaranties, there is no evidence in the case authorizing this court to hold that any such discharge was intended or effected, and no foundation for the claim that the sureties on the guaranty of 1881, were discharged by the acceptance, by the State of the guaranty of 1882.

The inquiry here may, therefore, be limited to the liability which the signers of the guaranty of 1881 incurred by the terms and conditions of their agreement. The main question arises over their liability for the debt existing, at the time of the execution of the guaranty, and arising out of the transactions and deposits of the year 1880.

It is claimed by the appellants that the guaranty taken in 1881 was intended to be prospective in its operation only, and did not cover existing deposits. It is not claimed, but that the express terms of the undertaking cover such a liability, but it is contended that the words of the condition, should be limited and controlled by the language of the recital, and, so restricted, could not reasonably be held to include an existing debt.

It cannot be disputed but that there is much authority tending to support the position contended for by the appellants, but we think the cases cited by them are generally cases where the language of the condition was doubtful and uncertain, and a consideration of the whole instrument and the circumstances surrounding the situation of the parties created an ambiguity, requiring the application of rules of construction, to determine the real obligation of the parties. The rule contended for is, however, one of construction, and obtains only for the purpose of ascertaining the real intention of the parties in making their contract. (*Burr v. American Spiral Spring Butt. Co.*, 81 N. Y. 175, 178; *Brandt on Suretyship*, § 138.)

It cannot prevail where the language of the condition

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clearly and unmistakably shows an intention to incur a liability not in terms referred to in the recital. Guaranties are subject to the same rules of interpretation as other contracts, and especially to that fundamental rule requiring them to be enforced according to the meaning and intent, and in the manner designed by the parties at the time of their execution. (*Rochester City Bk. v. Elwood*, 21 N. Y. 88, 90; *Burr v. Am. S. S. B. Co.* 81 N. Y. 175, 178.)

While the liability of guarantors is *strictissimi juris* and cannot be extended by construction beyond the plain and explicit language of their contract, they are still subject to the rule that effect must be given to all of the language contract, and a meaning and effect, ascribed to each of the word and phrase used therein, if it can be done without violating its plain intent. The general rule is undoubtedly, that a contract cannot be construed to have a retroactive operation, and that such an effect can be given to it only where by express words or by necessary implication, it clearly appears to be the intention of the parties to embrace past transactions, but when this does appear, it is indisputably competent for parties to bind themselves for such liabilities.

We are clearly of the opinion, in this case, that the contract itself recognizes an existing liability on the part of the bank to the State, and provides for its extension and the security thereof by the guarantors.

This would seem to be not only a natural requirement on the part of the State, while taking a new security from a debtor contemplating extended and continued transactions, but a necessary measure of precaution to avoid the complications involved, in investigating the transactions of former and perhaps remote years

It would be not only difficult, but almost impracticable, for the State to have its transactions, with such a depository separated into distinct divisions, and be compelled to seek its indemnity among the conflicting equities and claims of numerous sureties, liable upon different contracts for the transactions of different years.

It is, however, not permissible, we think, to resort to rules of construction in such a case as this, for there is no ambiguity in the language of the contract, and it provides in express terms for the liability in question. Thus, it states not only that the bank shall "well and faithfully account for and pay over all moneys deposited with it or for which it shall in any way become liable in and by said contract, according to the terms and provisions thereof," but "that said bank shall account for and pay over all money now on deposit in said bank to the people of the State of New York."

More explicit language could not be used, and it is impossible to assign any other meaning to the language used than that the sureties intended to be bound for the continuing security of the existing deposit.

It is not competent for parties to such an undertaking to allege that they were ignorant of the existence of a debt expressly provided for, or that they have been misled by the omission of their principal to notify them of its existence. (*Western N. Y. L. Ins. Co. v. Clinton*, 66 N. Y. 226, 330.)

The rule applicable to the subject is well stated in Brandt on Suretyship (§ 138), in the following language: "When the words of the condition of a bond are general and indefinite as to the time during which the surety shall remain liable, if there is a recital in the bond specifying the time during which the prescribed duty is to be performed by the principal, the general words will be limited by the recital and the surety will only be liable for the time therein specified. The reason is, that taking the whole instrument together it is but fair to presume that the parties had in contemplation only a liability for the time specified. It is a rule of construction adopted for effectuating the intention of the parties." (See, also, *Burr v. Am. Spiral Spring Co.*, *supra*.)

The conclusions reached on the propositions discussed necessarily dispose of all other questions raised by the appellants.

The judgment should, therefore, be affirmed.

All concur.

Judgment affirmed.

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THOMAS CORNELL, Respondent, v. WM. J. CLARK, as Sheriff,
etc., Appellant.

While the delivery of personal property to the vendee under an executory contract of sale is an important and controlling fact on the question as to change of title, it is not conclusive; if the delivery is simply to meet some term of the contract not inconsistent with the retention of title by the vendor, it will not pass the title contrary to the intention.

So where anything remains to be done to ascertain and identify the subject of sale the title does not pass.

A railroad corporation entered into a contract with M., by which the latter agreed to deliver to the former, at certain specified points on the company's lands, twenty thousand ties, at fifty-five cents each for first-class ties, and thirty-five cents "for what shall be adjudged second-class ties," to be inspected and counted by a person named. The company agreed to advance fifteen cents apiece for ties as they were delivered. "the remainder to be paid on or about the time the ties are taken and used." M. delivered a quantity of ties, which were counted, and the company paid the advance agreed upon. The ties were never inspected or divided into classes. The company became insolvent, and its property and franchises were sold on foreclosure. In an action wherein the question was as to the title to the ties, *held*, that the title did not pass to the company by the delivery; that it was not bound to take all the ties, but only such as should be adjudged first and second-class, the inspector having power to reject unmerchantable ties, and so, it could not be known until inspection and separation were made what part of the ties were to be taken.

Burrows v. Whitaker (71 N. Y. 291), distinguished.

Plaintiff, who was a director of the company, purchased the ties of M., paying individually the price agreed upon. The company had discontinued its operations and there was no evidence that plaintiff was acting as its agent in the purchase. He removed the ties after the purchase. Defendant, as sheriff, levied upon them by virtue of an execution against the company. *Held*, that, assuming plaintiff was disabled, as against the company, from purchasing on his own account, the legal title was vested in him by the purchase; and, as the company had not claimed the benefit thereof, which it could only do by reimbursing the price paid, that the property could not be taken from his possession by execution against it, and defendant was not in a position to question plaintiff's title.

(Argued January 28, 1887; decided March 1, 1887.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, in favor of plaintiff

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entered upon an order made June 5, 1885, which denied defendant's motion for a new trial and directed judgment on a verdict directed by the court.

This action was for the claim and delivery of certain railroad ties.

The primary question relates to the title to the ties on the 28th of February, 1879. The plaintiff claims title by virtue of a purchase in 1875, from persons, who, in 1871 and 1872, had cut the ties on their land, under contracts with the Delhi & Middletown Railroad Company, and had deposited them on or near the lands of the company. In 1879 the plaintiff took possession of and removed the ties, and while they were in his possession the defendant, as sheriff, on the twenty-eighth of February, in that year, levied thereon under an execution on a judgment rendered in 1873 against the company, claiming that the ties are the property of the defendant in the execution.

On or about the 20th day of December, 1871, the company entered into four several contracts for the purchase of ties, and the alleged title of the company is founded thereon, on an alleged delivery of the ties to the company under the contract.

The contract with Munson, one of the vendors, was in writing. The other contracts were verbal, but it is sufficiently accurate for the present purpose to state that they followed the terms of the Munson contract, and in determining the question presented, reference will be made to the Munson contract only. By the contract between Munson and the railroad company, Munson agreed to deliver to the company during the years 1872 and 1873, and prior to March 1, 1873, at certain specified points on the line of the railroad, 20,000 ties of chestnut and oak timber, "to be piled within the bounds of said railroad, and so near the track that they can be conveniently handed on to the cars." The company agreed to pay "fifty-five cents each for first-class ties, and thirty-five cents each for what shall be adjudged second-class ties, to be inspected and counted by Mr. Emerson,

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superintendent of the Rondout and Oswego Railroad, or, if he cannot be procured, by some man of experience in that business, to be agreed upon by the parties, each party to pay one-half of the expense of inspection and counting." The company also agreed to advance fifteen cents apiece for ties as they were delivered, to be paid between the fifteenth and twentieth days of each month during delivery, the remainder to be paid on or about the time the ties are taken and used." Soon after the date of the contract, Munson commenced drawing and delivering ties, some of which were piled on the lands of the company, and others, for want of room, on land of other parties adjacent, hired for that purpose by Munson. The ties were counted and the count delivered to Grant, the agent for the company, and the company, upon his audit, advanced the fifteen cents apiece, as provided in the contract. The ties were never inspected under the contract, or separated into classes, and the company never paid anything beyond the advance payment. The company ceased operations in 1874, and its property and franchises were sold on foreclosure in 1881.

In 1875, the vendors being pressed for money, and having failed to obtain payment of the balance unpaid from the company, applied to the plaintiff, to purchase the ties. The application resulted in an agreement between the vendors and the plaintiff, on their part, to sell, and on the part of the plaintiff to purchase all the first class ties at thirty-five cents each, deducting what had been paid by the railroad company. The sale was consummated, the plaintiff paying in cash the sum of \$3,971.09, the amount of the purchase-price over and above the sum of \$5,257.01, the amount of the advance made by the company under the contracts. The negotiation was for a sale to the plaintiff individually, and the receipts for the purchase-money recited a sale to him.

The ties remained where they were originally piled until 1879, when they were removed by the plaintiff. In that year he purchased the culls at the price of five or six cents apiece. The plaintiff, at the time of the original contract,

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and at the time of his purchase, was a director of the Delhi and Middletown Railroad Company.

I. H. Maynard for appellant. Upon delivery to and acceptance of ties by the railroad company, the title thereto became vested in the company, and the defendant had the right to levy upon them under the execution which he held. (*Burrows v. Whitaker*, 71 N. Y. 291; *S. C.*, 8 Hun, 493; *Crofut v. Bennett*, 2 N. Y. 260; *Campbell v. Patchen*, 19 id. 333, 334; *Bradley v. Wheeler*, 44 id. 502, 503; *Grote v. Gile*, 51 id. 431.) If conflicting inferences can be drawn from the testimony, or if the intention of the parties, to be gathered from the terms of the contract and their conduct under it, is regarded as doubtful, then the court should have submitted to the jury the question as to the intent of the parties, and whether there was a delivery to and acceptance by the company. (*Burrows v. Whitaker*, 71 N. Y. 295; *Terry v. Wheeler*, 25 id. 520; *Bacon v. Gillman*, 57 id. 656; *Schindler v. Houston*, 1 Coms. 261, 265, 269.) The trial court erred in not submitting to the jury the question whether the plaintiff was not acting as the officer or agent of the railroad company in the transactions between him and the vendors of the ties, in the summer of 1875, and under which he makes claim of title. (*Abbot v. Am. H. Rub. Co.*, 33 Barb. 578; *Van Epps v. Van Epps*, 9 Paige, 237; *Slade v. Van Vechten*, 11 id. 21; *De Caters v. Le Ray*, 3 id. 78; *Hubbell v. Medbury*, 53 N. Y. 98; *Lytle v. Beveridge*, 58 id. 592; *Terry v. Bk. of Orleans*, 9 Paige, 649; *S. C.*, 7 Hill, 260; *Bridenbecker v. Lowell*, 32 Barb. 9; *Dobean v. Racey*, 3 Sandf. Ch. 60; *Toole v. Kiernan*, 48 Sup. Ct. 163; *People v. Bd. of Stock Brokers Bldg Co.*, 92 N. Y. 98; *Wetmore v. Porter*, id. 76.)

S. L. Stebbins for respondent. Plaintiff acquired a perfect title unless the vendors had, prior to his purchase, transferred their title to the railroad company. (*Stowell v. Otis*, 71 N. Y. 36, 37, 38.) Under the Munson contract the title to the ties did not pass to the railroad company. (*Stephens v. Santee*, 49

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N. Y. 35; *Caulkins v. Hellman*, 47 id. 449; Benj. on Sales [2d ed.] 69, 110, 111, 235, 236, 257; *Singham v. Eggleston*, 27 Mich. 324.) The acceptance of the ties would depend upon their quality, to be ascertained by inspection. (Benj. on Sales [3d Am. ed.] § 140.) In selling to the plaintiff, the vendors exercised their right of rescission. (*Starbird v. Barrons*, 38 N. Y. 230, 237.)

ANDREWS, J. It is plain that no title to the ties which were the subject of the contract between Munson and the Delhi and Middletown Railroad Company, passed to the company on the execution of the contract of December 20, 1871. The contract was then wholly executory. It is inferable from the evidence, that, at the date of the contract, the ties were for the most part uncut on the lands of Munson.

No part of the purchase-money had been paid, and by the terms of the contract no payment was to be made until the ties were delivered at the points designated. It is clear that no title *in presenti* passed, or was intended to pass on the execution of the contract. This, however, is not decisive of the question in controversy. The decision turns upon the point whether there was a delivery of the ties in such sense as to vest the title in the railroad company. It is competent for parties to an executory contract for the sale of personal property, to provide in their agreement where and on what event the title shall vest in the vendee. If there is no express agreement on the subject, the question is to be solved by considering all the terms of the contract in connection with the acts of the parties, and applying thereto the rules of law applicable to the case. There is no express provision in the contract of December 20, 1871, upon the subject. It is insisted, however, that the contract provides for a delivery of the ties on the lands of the company, and that a delivery having been made pursuant to the contract that act was decisive on the question of title. It is doubtless true that the delivery of personal property to the vendee, under an executory contract of sale, is an important and often

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a controlling fact on the question of title. Where the delivery is absolute it furnishes the strongest evidence of an intent to pass the title. The voluntary surrender, by the vendor, of all dominion over the property is, as a general rule, inconsistent with the idea that the title is retained by the vendor. But if the delivery is for a special purpose, as where the property is put into the custody of the vendee to meet some term of the contract not inconsistent with the retention of title by the vendor, such a qualified delivery will not pass the title contrary to the intention. In looking at the contract of December 20, 1871, it is, we think, apparent that it was not contemplated that the title to the ties should pass, on the ties being deposited on the lands of the railroad company. The delivery provided for was for the purpose of inspection and selection. The payment to be made at that time was an *advance*, and the advance was to be made when the ties were deposited at the points designated. The company, by the contract, were to pay forty-five cents each for first-class ties, and thirty-five cents each for what "shall be adjudged" second-class ties, upon inspection pursuant to the terms of the contract. The company was not bound to take all the ties which might be delivered by the vendor, upon the lands of the company, upon which an advance might be made. It contracted to take only first and second class ties, according to the inspection of the person designated, or to be designated, as provided by the contract, who, in respect to this duty, was constituted the agent of both parties. The power of rejection was involved in the power of selection. The inspector might reject unmerchantable ties not coming within either of the classes mentioned. It could not be known until the inspection had been had and a separation made what part of the ties should be taken, or what number should be paid for, or what sum beyond the advance payment the company was bound to pay, or the vendors entitled to receive. It was not contemplated that there should be an inspection for the purpose of ascertaining the quality of the ties when the advance payment was made.

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The company could safely advance the fifteen cents on the whole number of ties deposited, but the final payment was to be made "when the ties were taken and used," and when the number and quality of the ties to be taken were ascertained by inspection, the "remainder" of the purchase-money would be known. The case is within the general principle that where anything remains to be done to ascertain and identify the subject of the sale, the title does not pass. What was left to be done was not simply to determine by count or by a division of the whole number of ties into two classes, the amount remaining unpaid, but it involved identification and specification also. The case is unlike *Burrows v. Whitaker* (71 N. Y. 291.) In that case the vendee was to take all the lumber delivered, irrespective of selection. Nothing remained to be done except its separation into classes. In this case the company was bound to take only such part of the ties as should be adjudged by the inspector to be first or second-class ties. The case is more nearly like the case of *Stephens v. Santee* (49 N. Y. 35); see, also, *Lingham v. Eggleston*, 27 Mich. 324; Bingham on Sales, 227 *et seq.* There are other circumstances which support the conclusion on this branch of the case. By one contract it was expressly agreed that the title should remain in the vendor until the purchase-money should be paid. A large number of ties were piled on lands of private persons, for which rent was paid by the vendors. It is claimed that the company accepted the ties and waived inspection. We think there was no sufficient evidence upon which the jury would have been justified in finding such acceptance or waiver.

But the defendant assails the title of the plaintiff, or rather he insists that the purchase by the plaintiff in 1875, enured as a purchase by the company, on the ground that the plaintiff, being at that time a director of the railroad company, was disabled from purchasing the ties on his own account, and that in fact he purchased them as agent for the company. The company discontinued its operations in 1874, and its property was sold

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on foreclosure in 1881. It had paid on the ties in 1872 and early in 1873, the advance payment amounting to \$5,257.01, and though called upon to do so, made no further payment. In 1875 the vendors, through one Grant, applied to the plaintiff to become the purchaser of the ties, and it resulted in his agreeing to purchase the first-class ties at the price of thirty-five cents each, provided the vendors would "deduct therefrom what had been paid by the railroad company." This was assented to and the plaintiff paid for the first-class ties in cash the sum of \$3,971.09. Subsequently, in 1879, he bought the culls at five or six cents apiece. The negotiation was for a sale to the plaintiff individually, and the receipts for the purchase-money paid by the plaintiff, recited a sale to him. It is not claimed that the plaintiff was authorized to purchase for the company, nor to advance any money on its account, nor is it denied that the \$3,791.09 was paid by the plaintiff from his own means. The ties remained where they were originally deposited until 1879, when they were removed by the plaintiff and were in his possession at the time of the levy by the defendant. Assuming that the plaintiff was disabled by the rule in equity from purchasing the ties on his own account, or from holding them as against the company, nevertheless the legal title was vested in him by the purchase, and the property could not be taken from his possession under an execution against the corporation. The plaintiff was not, in fact, the agent of the company, to make the purchase, nor has the company claimed the benefit of the purchase. The purchase by a trustee of trust property is voidable, not void. The company could only claim the benefit of the purchase by the plaintiff on reimbursing the sum expended by him in obtaining the title. The defendant claiming under the execution is not in a situation in this proceeding to question the plaintiff's title.

We think the verdict was properly directed and the judgment should, therefore, be affirmed.

All concur.

Judgment affirmed.

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ELLEN POMFREY, Respondent, v. THE VILLAGE OF SARATOGA SPRINGS, Appellant.

Where, by the charter of a municipal corporation, the duty is imposed upon it of keeping its streets and sidewalks in a reasonably safe and proper condition for public use, for a neglect to perform this duty it is liable for damages to persons who because thereof, without fault on their part, receive injuries.

Actual notice to the proper municipal authorities of a defect is not necessary in order to charge it with negligence; they owe to the public the duty of active vigilance; and where a street or sidewalk has been out of repair for any considerable length of time, so that by reasonable diligence they could have notice of the defect, such notice may be imputed to them.

Snow and ice which had fallen from time to time from a barn adjoining the sidewalk on one of defendant's streets, had accumulated on the sidewalk to the height of about three feet above the surface, and about two and a half feet above the snow on the rest of the sidewalk. This accumulation had been there about two weeks when plaintiff, in passing over it, fell and was injured. By defendant's charter (chap. 220, Laws of 1886) the care and custody of its streets are imposed upon its trustees, and it is made their duty to establish such ordinances and regulations as they may think proper, among other things, to provide for and regulate the repairing and cleaning of streets and sidewalks, and power is given to raise money to discharge these duties. In an action to recover damages, *held*, that defendant was properly charged with negligence.

It appeared that the street in question, with its sidewalks, had been open for its full width for about forty years; it was a principal street of the village and extensively used. Water mains were laid through it, and curb-stones had been placed along the sidewalks at the expense of the village. *Held*, the evidence justified a finding that the street, for its whole width, had been dedicated to and accepted by the public, and that it was legally one of the village streets.

By defendant's charter, after provisions had been made for repairs of its streets and sidewalks, for the purpose of providing the means for defraying expenses, the board of trustees were authorized to raise annually a sum not exceeding an amount specified "for the support of roads * * * streets, lanes and alleys within the village." *Held*, that the word "streets" included the whole space between the outer lines thereof, *i. e.*, not only the roadway but the sidewalks; and that the money raised could be used as well for the repair of the sidewalks as the roadbed.

The village superintendent, whose duty it was, under the direction of the trustees to make repairs, testified that he did not have any money in his

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hands for that purpose; there was no proof that there were not sufficient funds in the treasury of the village, which under the charter could have been placed in his hands. *Held*, the evidence failed to show want of funds to repair the sidewalk.

Also *held*, that plaintiff's claim was not of the character required by the act of 1875 (§ 2, chap 517, Laws of 1875) to be presented to and audited by the auditors of the village.

Upon the trial plaintiff offered in evidence an ordinance of the village, which imposed penalties upon persons who should throw snow or ice from roofs upon sidewalks, or who should neglect to keep sidewalks in front of their lots and buildings clear of snow and ice; this was received under objection and exception. *Held*, no error.

A witness called for the plaintiff, after she had testified as to the condition of the sidewalk, and that a person had to be very careful, or fall, as she knew from experience, was permitted to testify, under objection, that she fell down in the same place. *Held*, no error.

The evidence tended to show that this embankment of snow and ice was perfectly visible; there was a light covering of recent snow over the ice. *Held*, a refusal of the court to charge, as matter of law, that it was negligence for plaintiff, under the circumstances, to attempt to pass over the embankment was not error.

(Argued January 28, 1887; decided March 1, 1887.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made February 12, 1885, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial. (Reported below, 34 Hun, 607.)

This action was brought to recover damages for injuries sustained by plaintiff by reason of a fall upon a sidewalk in the village of Saratoga Springs from which the complaint alleged defendant had negligently omitted to remove a dangerous accumulation of ice and snow.

The facts are sufficiently stated in the opinion.

Charles S. Lester for appellant. If any duty rested upon defendant to keep its sidewalks clear of ice and snow, this duty was not created or increased by the passage of any by-laws or ordinances, as no ordinance can enlarge, diminish or vary its powers or duties. (*Thompson v. Roe*, 22 How. [U. S.], 422; *Dillon on Munic Corp.*, §§ 251, 542, 620.) A

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corporation is not liable to an action for a neglect in not enforcing any of its ordinances or by-laws, or for any neglect of its officers in that respect, and is not responsible for their violation. (*Levy v. Mayor, etc.*, 1 Sand. S. C. Rep. 465; *Hutson v. Mayor, etc.*, 5 id. 303; *Lorillard v. Town of Monroe*, 1 Kernan, 396; *Griffin v. Mayor, etc.*, 5 Seld. 458; *Stillwell v. Mayor, etc.*, 49 Sup. Ct. R., 360; Dillon on Munic. Corp. § 754.) Neither is a corporation liable for a failure to pass any ordinance. (*Wilson v. Mayor, etc.*, 1 Den. 595; *Hutson v. Mayor, etc.*, 5 Sand. S. C., 303; Dillon on Munic. Corp. § 753; *Fowle v. Common Council of Alexandria*, 3 Pet. 398; *Hines v. City of Lockport*, 50 N. Y. 236.) The judge erred in overruling the objection and in admitting the by-laws as evidence. (*Brown v. B. & S. L. R. R. Co.*, 22 N. Y. 191; *Knipple v. Knicker. Ice Co.*, 84 id. 488; *Massoth v. D. & H. C. Co.*, 64 id. 524; *McGrath v. N. Y. C. & H. R. R. Co.*, 63 id. 530; *Moore v. Gadsen*, 93 id. 12; *Coleman v. People*, 58 id. 561; *Baird v. Gillett*, 47 id. 186; *O'Hagan v. Dillon*, 76 id. 170; *Erben v. Lorillard*, 19 id. 299; *Arthur v. Griswold*, 55 id. 400; *Anderson v. R. W. & O. R. R. Co.*, 54 id. 334; *Brague v. Lord*, 67 id. 495, 499; *Worrall v. Parmelee*, 1 id. 519; *People v. Gonzalez*, 35 id. 59; *Enders v. Sternbergh*, 1 Keyes, 264, 271.) Proof of former accidents happening at the same place is immaterial. (*Sherman v. Kortright*, 52 Barb. 269; *Blair v. Pelham*, 118 Mass. 420; *Parker v. Portland Publishing Co.*, 69 Me. 173; *Hubbard v. R. R. Co.*, 39 id. 106; *Collins v. Dorchester*, 6 Cush. 396; *Hudson v. Ch. & N. W. R. R. Co.*, 59 Ia. 581; 27 Alb. L. J. 115; *Wooley v. Grand St. R. R. Co.*, 83 N. Y. 130; *Quinlan v. City of Utica*, 11 Hun, 217; 74 N. Y. 603; *Eggleston v. Col. Turnpike Co.*, 18 Hun, 146; *Burns v. City of Schenectady*, 24 id. 10; *Dale v. D. L. & W. R. R. Co.*, 73 N. Y. 468; *Hawley v. Hatter*, 9 Hun, 134.) The obstruction being visible and apparent, it was plaintiff's duty to avoid it. (*Salter v. U. & B. R. R. Co.*, 75 N. Y. 276; *Pakalnsky v. N. Y. C. R. R. Co.*, 82 id. 424; *Quincy v. Barker*, 81 Ill. 300; *O'Laughlin v. Dubuque*, 42 id. 539; *Ernst v. H. R.*

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R. R. Co., 39 id. 61; *Wilcox v. R. W. & O R. R. Co.*, id. 358, 366.) The place where the plaintiff was injured, although open to the public, was not, in fact, a public street, over which defendant had jurisdiction. (*Rosell v. Andrews*, 7 East. R. 334; 24 W. D. 448; *Walsh v. Mead*, 8 Hun, 387; *City of Rochester v. Montgomery*, 72 N. Y. 65; *Village of Port Jervis v. First Nat. Bk.* 96 id. 550; *Durgin v. City of Lowell*, 3 Allen, 398.) This claim should have been presented to or acted upon by the auditors of the village. (*Reining v. City of Buffalo*, 102 N. Y. 308; *Minick v. City of Troy*, 83 id. 514; *McCluskey v. Cromwell*, 11 id. 593; *Benton v. Wickwire*, 54 id. 226.) There is no duty resting on the defendant to clear off its sidewalks from snow and ice, because no power has been conferred upon it to raise and expend money for such purpose. (*Hines v. City of Lockport*, 50 N. Y. 238; *Weed v. Village of Ballston Spa*, 76 id. 335.) There is a recognized difference between streets in cities or incorporated villages, and roads and highways as designated in the general highway system of the State. (*In re Woolsey*, 95 N. Y. 135; *In re Lexington Ave.* 29 Hun, 303; Laws of 1863, chap. 93; Laws of 1876, chap. 340; Laws of 1880, chap. 305.) Therefore, as by the charter of Saratoga Springs a complete scheme is provided for making, repairing and clearing sidewalks by the owners of adjoining property, and when no authority is given anywhere to raise money for those purposes, but by implication the right to use money therefor is excluded, the trial judge should have granted the motion for a nonsuit. (*Garlinghouse v. Jacobs*, 29 N. Y. 297; *Hover v. Barkhoof*, 44 id. 113, 120, *Hines v. City of Lockport*, 50 id. 236; *Weed v. Village of Ballston*, 76 id. 335; *People ex rel. Loomis v. Town of Little Valley*, 75 id. 316; *Hiller v. Village of Sharon*, 28 Hun, 344; *Conrad v. Trustees of Ithaca*, 16 N. Y. 161.)

L. B. Pike and *Chas. M. Davison* for respondent. The street in question was one of the streets or highways of the village over which it had jurisdiction, and which it was bound

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to keep in repair. (*Pearsall v. Post*, 20 Wend. 115; *Hickok v. Trustees of Plattsburgh*, 41 Barb. 135; *Wiggins v. Talmage*, 11 id. 457; *People v. Loehfelm*, 102 N. Y. 1; *Salsbury v. Village of Ithaca*, 94 id. 30; *Requa v. City of Rochester*, 45 id. 129.) The village having treated Lake avenue as a street within its limits, is estopped from denying that it is a street or sidewalk within its control. (*Sewell v. City of Cohoes*, 75 N. Y. 45; *Graves v. Otis*, 2 Hill, 466, 470.) The evidence tended to prove the actual dedication, acceptance and user, and that it was one of the streets over which defendant had and exercised jurisdiction and this court is concluded thereby. (*People v. Loehfelm*, 102 N. Y. 1) The sidewalk in this case having been built, no matter by whom, the keeping in repair was a ministerial act, and not in any sense judicial. (*Salsbury v. Village of Ithaca*, *supra*.) The duty to keep the sidewalk in repair is imposed by charter of village. (Laws of 1866, chap. 220, § 25, subd. 14, 23, 39, 43, 44, 45; §§ 35, 36, 38, 39, 54.) Proof that the superintendent had not funds in his hands is no evidence that the defendant had not; it was his duty to report to the trustees if he had not. (Charter, § 39; *Weed v. Village of Ballston Spa*, 76 N. Y. 335.) The corporation defendant had constructive notice, at least, of the condition of the sidewalk. Constructive notice was sufficient. (*Requa v. City of Rochester*, 45 N. Y. 129; *Todd v. City of Troy*, 61 id. 506; *Kinney v. City of Troy*, 38 Hun, 287; *Deyoe v. Village of Saratoga*, 3 N. Y. Supr. Ct. [T. & C.] 504; *Goodfellow v. City of N. Y.*, 100 N. Y. 15.) It was the duty of defendant to keep the street clear of this obstruction; keep the sidewalk in condition, that the traveler might safely pass over it, no matter by whom or how the obstruction was placed there, and if, after actual or constructive notice, it neglected its duty, it is made liable for any damages resulting therefrom to a traveler whose own negligence does not contribute to the injury. (*Todd v. City of Troy*, 61 N. Y. 509; *Weed v. Village of Ballston*, 76 id. 333; *Hines v. City of Lockport*, 50 id. 236; *Salsbury v. Village of Ithaca*, 94 id. 27; *Regberg v. Mayor, etc.*, 91 id. 137; *Hyatt v. Village*

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of *Rondout*, 44 Barb. 385; *Hume v. Mayor, etc.*, 74 N. Y. 270; *Moore v. Gadsden*, 87 id. 86, 87, 88; *Kinney v. City of Troy*, 38 Hun, 287.) The plaintiff had a right to assume that the sidewalk was safe and was not required to be on guard against this unlawful obstruction. (*McGuire v. Spence*, 91 N. Y. 303; *Evans v. City of Utica*, 69 id. 166; *Brusso v. City of Buffalo*, 90 id. 679; *Driscoll v. Mayor, etc.*, 11 Hun, 101; *Thomas v. Mayor, etc.*, 28 id. 110; *Bullock v. Mayor, etc.*, 99 N. Y. 654; *Divine v. Bailey*, 131 Mass. 169; *Davenport v. Ruckman*, 37 N. Y. 573; *Child v. West Troy*, 23 Hun. 68.) The court at the trial committed no error in overruling defendant's objection to the evidence as to the condition of the sidewalk and the danger of falling. (*Quinland v. City of Utica*, 11 Hun, 217; 74 N. Y. 603.)

EARL, J. The plaintiff commenced this action to recover damages for injuries received by her from falling upon one of the sidewalks in the village of Saratoga Springs, on the 9th day of January, 1883. At that time, snow and ice had accumulated upon the sidewalk on the southerly side of Lake avenue, opposite the premises of one Andrews, until the embankment was about three feet thick above the surface of the ground, and two and one-half feet thick above the snow upon the sidewalk easterly and westerly of the premises mentioned. While she was passing along the sidewalk over this embankment she slipped down and received the serious injuries of which she complains. This snow and ice had fallen, from time to time, from the roof of a barn standing near the sidewalk, and had been there for at least two weeks.

Under its charter (Chap. 220, Laws of 1866), the village of Saratoga Springs is constituted a separate road district, exempt from the superintendence and care of the commissioners of highways of the town of Saratoga Springs, and the trustees are constituted and declared to be the commissioners of the village; they are authorized to appoint a superintendent who is to have the care and supervision of the streets and sidewalks

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of the village, subject to their general control and direction ; they are empowered, and it is made their duty to establish such ordinances, by-laws and regulations as they may think proper and reasonable, among other things to establish the grade of the streets and sidewalks, to provide for and regulate the paving, repairing and improving streets and sidewalks, and the cleaning of streets and sidewalks as often as may be necessary ; and ample power is conferred upon the village and its trustees to raise money for the purpose of discharging the duties and obligations thus imposed upon it in reference to its streets and sidewalks.

That under such a charter it was the duty of the defendant to keep its streets and sidewalks in a reasonably safe and proper condition for public use, and that for neglect of such duty it was liable for damages to persons, without fault on their part, receiving injuries upon its streets, has been settled by many decisions in this State, and is no longer open to question. (*Conrad v. Village of Ithaca*, 16 N. Y. 158, *Requa v. City of Rochester*, 45 id. 128 ; *Hines v. City of Lockport*, 50 id. 236 ; *Todd v. City of Troy*, 61 id. 506 ; *Evans v. City of Utica*, 69 id. 166 ; *Weed v. Village of Ballston Spa*, 76 id. 329 ; *Saulsbury v. City of Ithaca*, 94 id. 27 ; *Dubois v. City of Kingston*, 102 id. 219.) The rule of municipal responsibility as to streets and sidewalks is equally applicable to incorporated villages and to cities, and the same principles which impose liability upon the one class of corporations impose it upon the other.

If the municipal authorities have actual notice of a dangerous defect in a street, then it is their duty without unreasonable delay to repair it. They do not fill the measure of their responsibility, however, by acting simply when they have actual notice ; but they owe to the public the duty of active vigilance ; and when a street or sidewalk has been out of repair for any considerable length of time, so that by reasonable diligence they could have notice of the defect, such notice may be imputed to them. So, in this case, if all the other conditions existed for imposing liability upon the

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defendant, it is not claimed that the facts of the case were not such that the jury could find that the defendant had, or ought to have had, notice of the dangerous condition of this sidewalk.

But the defendant seeks to escape liability upon various grounds which will be separately noticed.

(1.) It is claimed that the place where the plaintiff was injured, although used by the public, was not in fact a public street or sidewalk over which the defendant had jurisdiction. But it is undisputed that this street had been open to its full width for about forty years; that it was one of the principal streets of the village, extensively used by the public; that the sidewalk had been laid out and used during all of that time; that water mains had been laid through the street; that the village had assumed jurisdiction over it, and that curb-stones had been placed along the sidewalks at the expense of the village. We think that there was abundant evidence from which the jury could properly find that this street, for its whole width, had been dedicated to and accepted by the public, and that it was legally and lawfully one of the streets of the village. (*Cook v. Harris*, 61 N. Y. 448; *People v. Loehfelm*, 102 N. Y. 1.)

(2.) It appears sufficiently that the defendant either had the means to clear this sidewalk of the accumulation of ice and snow or the ability to raise the means. By section 38 of the village charter, it is made the duty of the village superintendent, in the month of April of each year, to report, in writing, to the board of trustees the general condition of "the streets, bridges, culverts, sidewalks, lanes and alleys with estimates of the probable expense to put them in good repair. He shall also within ten days prior to each annual village election report, in writing, to the board of trustees the condition of the streets, bridges, culverts, sidewalks, lanes and alleys with the probable amount necessary to keep them all in good order during the coming year." Section 39 provides that whenever "any repairs shall be necessary on any public street, bridge, culvert, sidewalk, lane or alley in said village

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the village superintendent shall attend to such repairs, and when there are no funds in his hands to make such repairs he shall report the fact to the board of trustees with his opinion as to the amount necessary for such purpose, to the end that the means may be provided and drafts drawn upon the particular fund belonging to the highway department to meet such expenses. He shall be subject to the same direction and control of the commissioners of highways of the village in the care and supervision of the public streets, bridges, culverts, sidewalks, lanes and alleys therein and to the same penalties for neglect of duty as the overseers of highways of the several road districts in the town of Saratoga Springs are to the commissioners of highways of said town. He shall be personally responsible to the public for neglect of duty to the same extent as the commissioners of said village." Section 54 provides that for the purpose of "providing the means of sustaining the several departments and defraying the expenses of the corporation, the board of trustees are authorized to levy and collect an annual tax in amounts and for the purposes as follows:

Subdivision 1. Not exceeding \$7,500 for the support of roads, bridges, culverts, streets, lanes and alleys within the village."

The claim on the part of the defendant is, that because sidewalks are not mentioned in this last section, therefore there was no power in the trustees to raise any money for the repair of sidewalks. But in various other parts of the charter sidewalks are specially mentioned, and they are placed under the care and supervision of the trustees; and the superintendent under their direction is bound to attend to and make the repairs upon them as well as the streets. The word "streets" is used here in its broad sense and was intended to include not only the roadway for teams, but the sidewalks for pedestrians. (*In re Burmeister*, 76 N. Y. 174.) While it is made the duty of the village to keep the sidewalks in repair, it would be quite extraordinary if there were no provision in the charter by which it could procure funds for the purpose

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of discharging that duty. We think, therefore, that the word "streets" should be held to mean the entire space between the outer lines of the streets, including the sidewalks, and that the money authorized to be raised under that section could be used as well for the repair of the sidewalks as of the road-bed in the center of the streets.

The only evidence given on the trial to prove that the village had no funds to repair this sidewalk was the evidence of the village superintendent who testified that he did not have any money in his hands for that purpose. But there was no proof that there were not sufficient funds in the treasury of the village which, under the charter, could have been placed in his hands and used for that purpose if he had applied for it.

(3.) It is further objected that the plaintiff's claim was never presented to or acted upon by the auditors of the village as required by chapter 517 of the Laws of 1875. A sufficient answer to this objection is that it was in no way made upon the trial, and is not presented to us by any proper exception. But it may, however, be further said that the plaintiff's claim is not one of those which is required to be audited under that act. The claims there referred to are clearly claims for expenditures made on behalf of the village, or for services rendered for, or goods or materials furnished to the village. And this claim, therefore, required no audit.

(4.) Upon the trial the plaintiff offered in evidence one of the ordinances of the village, which imposed penalties upon persons who should throw any snow or ice from roofs upon sidewalks, and upon the owners and occupants of lots or buildings who should neglect to keep the sidewalks in front of their lots and buildings free and clear of snow and ice and other incumbrances. The defendant objected, and the objection was overruled and the evidence admitted. In this we perceive no error harmful to the defendant. It was not held liable for failure to make proper ordinances, or to enforce the ordinance proved. So far as it had any effect whatever, it would seem to have been beneficial to the defendant, as it

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showed that it had so far discharged its duty by passing proper ordinances for keeping the sidewalks free and clear of ice and snow. It had no material bearing in favor of the plaintiff except to show that the trustees were aware of the importance of removing such obstructions from the sidewalks of the village and of their dangerous character.

(5.) It is also claimed that there was error in allowing one of the witnesses to testify, against the objection of the defendant, that she fell down once at the same place where the plaintiff was injured. She was called by the plaintiff to testify to the condition of the walk, and testified that she recollected its condition; that the snow was packed very hard from falling from the roof of the barn; that the embankment at each end was slanting, and that a person had to be very careful or fall; that she knew that to be a fact and spoke from experience; and then she was permitted to say that she fell there once herself. That evidence was given, apparently to show how she came to know the condition of the walk at that place. But such evidence has been held to be competent. (*Quinlan v. City of Utica*, 11 Hun, 217, affirmed, 74 N. Y. 603.)

(6.) The evidence tended to show that this embankment of snow and ice was perfectly visible; that the plaintiff must have seen it as she passed over it, and that there was a light covering of recent snow over the ice. The defendant requested the court to charge the jury "that if the obstruction was visible and apparent to any passer by, the plaintiff was guilty of negligence in attempting to cross it;" also that "if the defect complained of was such as would be seen by an ordinary person passing along the street, it was negligence for the plaintiff to attempt to pass over the defect, but she should have gone around the same." The court declined to charge as requested, and the defendant's counsel excepted.

The charge of the judge sufficiently laid down the rule of law as to plaintiff's contributory negligence, and it would not have been proper for the judge to charge as matter of

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law that it was negligence for the plaintiff, under the circumstances disclosed in this case, to attempt to pass over the embankment. (*Evans v. City of Utica, supra, Brusso v. City of Buffalo*, 90 N. Y. 679; *McGuire v. Spence*, 91 id. 303; *Bullock v. Mayor, etc.*, 99 id. 654.)

We have now noticed all the objections to plaintiff's recovery, which were brought to our attention upon the argument of this case by the learned counsel for the appellant, and we do not think any of them furnish a sufficient reason for the reversal of the judgment. We may, however, say that the responsibility cast upon cities and villages, for injuries caused by slipping down upon streets and sidewalks, in consequence of snow and ice, is a very serious one. In this climate, where during several months of the year snow falls in large quantities and ice is from time to time created, it is quite impossible, particularly in villages, at all times to keep the streets and sidewalks in a safe condition. In this village it appears that there were seventy-five miles of sidewalks, and but one superintendent having charge of all the streets and sidewalks. It is manifestly difficult under such circumstances for such a village to keep its sidewalks at all times clear of snow and ice; and the proof should be very satisfactory, showing clear neglect of duty, before liability for injuries caused by snow and ice should be imposed.

The evidence from which such notice could be imputed to the defendant, as would charge it with negligence in not removing this embankment of snow and ice, was very meagre and slight; but we cannot say that it was not sufficient for the consideration of the jury. Indeed it was not claimed at the trial or on the argument before us that it was not.

* Actions of this nature are becoming quite numerous, and they may well cause some alarm to those who bear the burdens of village taxation. But they must rely for their protection against unjust accident claims in the justice and sound sense of jurors, and in the power which the courts below possess to deal with verdicts, which are excessive in amount or against the weight of evidence.

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We therefore reach the conclusion that the judgment should be affirmed, with costs

All concur, except PECKHAM, J., not sitting.

Judgment affirmed.

SAMUEL L. MILLER, an Infant, etc., Respondent, v. RICHARD WOODHEAD, Appellant.

Defendant leased to a Mrs. O'B. three rooms in a house, the windows of which overlook the flat roof of an extension. The lessee had a right to use the roof for the purpose of hanging out and drying clothes, but defendant cautioned her not to let children go on the roof, and she had never allowed them to go there. In this roof near one of the windows was a skylight. Plaintiff, an infant about three years old, whose mother, accompanied by him, had called on Mrs. O'B., fell out of the window, down through the skylight and was injured. There had been formerly a thin wire screen over the skylight to protect the glass, but it had become old and rotten and was removed about six weeks prior to the accident and had not been replaced. In an action to recover damages for the injury, *held*, that defendant had violated no duty which he owed to plaintiff and was not liable; that the latter could not take advantage of the violation, if any, of a duty plaintiff owed to Mrs. O'B., unless at the time of the accident he was in someway connected with her, *i. e.*, carrying out some right which she herself had.

(Argued January 31, 1887; decided March 1, 1887.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made May 8, 1885, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

This action was brought to recover damages for injuries alleged to have been caused by defendant's negligence.

The material facts are set forth in the opinion.

Henry P. Starbuck for appellant. As the defendant did not, directly or indirectly, invite or entice the plaintiff to go out upon the roof, he owed no duty to the plaintiff upon that or

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any other ground to cover the skylight for the plaintiff's protection. (*McAlpin v. Powell*, 70 N. Y. 126.) A duty to use care owed to one person does not operate in favor of another person. (*Larmore v. Crown Point Iron Co.*, 101 N. Y. 391; *Burke v. De Castro*, 11 Hun, 354; *Victory v. Baker*, 67 N. Y. 366; *McAlpin v. Powell*, 70 id. 126, 130; *Nicholson v. E. R. Co.*, 41 id. 525, *Sutton v. N. Y. & P. R. R. Co.*, 66 id. 243.) The fact that the roof was under the windows did not, under the circumstances, oblige defendant to keep it in safe condition for people to fall upon. (*McAlpin v. Powell*, 70 N. Y. 126-131; *Beck v. Carter*, 68 id. 283; *Camp v. Wood*, 76 id. 92; *Edwards v. N. Y. C. & H. R. R. Co.*, 98 N. Y. 245, 258.) Absence of contributory negligence must be shown by the plaintiff by a preponderance of proof. (*Button v. H. R. R. Co.*, 18 N. Y. 248; *Hart v. H. R. B. Co.*, 84 id. 56; *Warner v. N. Y. C. R. R. Co.*, 44 id. 465; *Reynolds v. N. Y. C. & H. R. R. Co.*, 58 id. 248; *Cordell v. N. Y. C. & H. R. R. Co.*, 75 id. 330; *Riceman v. Havemeyer*, 84 id. 647; *Becht v. Corbin*, 92 id. 658; *Mangam v. B. R. Co.*, 38 id. 455; *Ihl v. Forty-second St. R. R. Co.*, 47 id. 317; *McGarry v. Loomis*, 63 id. 104; *Fallon v. C. P. N. & E. R. R. Co.*, 64 id. 13; *Hartfield v. Roper*, 21 Wend. 615; *Birckett v. Knick. Ice Co.*, 41 Hun, 404; *Totten v. Phipps*, 52 N. Y. 354, 358.) Plaintiff has furnished no ground for an inference that he was not negligent, and if the question was as to his negligence only, the complaint should have been dismissed for this reason. (*Reynolds v. N. Y. C. & H. R. R. Co.*, 58 N. Y. 248; *Cordell v. N. Y. C. & H. R. R. Co.*, 75 id. 380; *Riceman v. Havemeyer*, 84 id. 647.) Plaintiff's custodians are not shown to have been free from negligence. (*Fallon v. C. P. N. & E. R. R. Co.*, 64 N. Y. 13.)

J. Gray Boyd for respondent. It was the duty of the defendant, after he caused the repairs to be made to the skylight, to see that the roof was left in a safe condition for the use for which he had let it to his tenant, Mrs. O'Brien, and that gave her the right to go upon it for the purpose of hang-

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ing out clothes. (*Castle v. Duryea*, 32 Barb. 480; 2 Marsh. 277.) That it was dangerous to the lives and persons of others who might lawfully be upon the premises, as visitors or otherwise, in the apartments of Mrs. O'Brien, owing to the close proximity of the skylight to her window-sill, is clearly shown in the case of the plaintiff; and the defendant, by reason of his negligence, is liable to the plaintiff for his injuries received, irrespective of whether there existed any privity between them or not. (*Burke v. De Castro*, 5 N. Y. Week. Dig. 239; *Cesar v. Karutz*, 60 N. Y. 229; *Barney v. Burnsteinbinder*, 64 Barb. 412; *Pickhard v. Collins*, 23 id. 445; *Robbins v. Mount*, 4 Rob. 553; *Fire Dept. v. Williamson*, 16 Abb. Pr. 402.) The question of contributory negligence is not to be applied inflexibly, and in all cases, without regard to age or other circumstances. (*Fallon v. C. P. N. & E. R. R. Co.*, 64 N. Y. 13; *McGovern v. N. Y. C. & H. R. R. Co.*, 67 id. 417.) It was not negligent, *per se*, on the part of plaintiff, an infant of three years of age, to proceed to the window on entering the apartments of Mrs. O'Brien. (*Hammock v. White*, 11 C. B. [N. S.] 588; *Prendegast v. N. Y. C. & H. R. R. R. Co.*, 58 N. Y. 652; *Hays v. Miller*, 70 id. 112.) The plaintiff, at the time of his injury, being plainly *non sui juris*, no personal negligence could be imputed to him, and his conduct presented no bar to a recovery and was properly submitted to the jury. (*Hays v. Miller*, 70 N. Y. 112; *Schwieger v. N. Y. C. R. R. Co.*, 15 Hun, 572; *Prendegast v. N. Y. C. & H. R. R. R. Co.*, 58 N. Y. 652; *Ihl v. Forty-second St. R. R. Co.*, 47 id. 317; *Miller v. McClosky*, 1 Code Civ. Pro. 252; *Fallon v. Central Pk., N. & E. R. R. Co.*, 64 N. Y. 13.) The same critical rule of contributory negligence does not apply to all persons of immature judgment and incomplete experience, as is made to control the conduct of adults. (*Nelson v. Liverpool Brewing Co.*, 5 N. Y. Week. Dig. 251; *Kay v. Penn. R. R. Co.*, 65 Penn. 269, 276; *Lynch v. Nurdin*, 1 A. & E. [N. S.] 330; 41 Eng. C. L. 442; *Burger v. Gardner*, 19 Conn. 507,

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512; *Clark v. Chambers*, 2 Q. B. L. R. 327; *O'Marro v. H. R. R. R. Co.*, 38 N. Y. 445; *Mowrey v. Cent. City R. R. Co.*, 51 id. 666; *Reynolds v. N. Y. C. & H. R. R. R. Co.*, 58 id. 248; *McGovern v. N. Y. C. & H. R. R. R. Co.*, 67 id. 417; *Penn. R. R. Co. v. Kelly*, 31 Penn. 372; *Miller v. McClosky*, 1 Code of Civ Pro. 250.) The fact that defendant left the skylight in a dangerous condition for a period of six weeks renders him liable to the plaintiff, for the reason that he failed to secure it after a reasonable time has elapsed, and the negligence thereby became his own, and was properly submitted to the jury. (*Harrison v. Collins*, 6 N. Y. Week. Dig. 383.)

PECKHAM, J. The defendant was the owner of a house in Thirty-third street, New York, some rooms in which he had rented to a Mrs. O'Brien, who was the step-mother of the plaintiff's mother, the plaintiff being an infant of about the age of three years. Mrs. O'Brien had three rooms in the rear of the house, overlooking an extension thereof, which was covered with a tin roof, and in which there was a skylight to give light to a saloon situated in such extension. Mrs. O'Brien had leased the right to use this roof for the purpose of hanging out and drying her clothes, and when she rented the rooms the defendant had cautioned her about not letting children out on the roof, because the ceiling was very bad, and she had never allowed them to go there. This tin roof was about a foot below the windows of Mrs. O'Brien's rooms, which looked out on it. About sixteen or eighteen inches from the wall in which the windows were set the skylight in question was situated, so it was about a foot below the windows and sixteen inches away from the wall. The skylight had panes of glass in it, and there had been a wire screen over the glass, made of long and small wires, very thin and in bad condition, old and rotten. This screen had been taken off the skylight some six weeks prior to the accident, and at the time of its occurrence had not been replaced. The glass in the skylight would have been very likely broken, if not covered,

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as the boys used to climb up a ladder and play ball about there.

The sill of the windows, from the floor inside, was about twenty-three inches, and in order to go out on the roof, from the rooms occupied by Mrs. O'Brien, it was necessary to raise the window and crawl through the lower part of it. The permission given by the defendant was to Mrs. O'Brien to go out on the roof and dry her clothes there. There were no bars on the window, and if there had been she says she would not have taken the premises.

On the day in question the mother of plaintiff, with a babe in her arms, and accompanied by plaintiff, called at Mrs. O'Brien's, and as they went in the room plaintiff's mother started to put the babe on a bed, in the bed-room off the kitchen, and was gone but a few seconds when Mrs. O'Brien saw the plaintiff, who had gone to the window, tumbling out. She caught sight of him just as he was disappearing. He fell through the skylight and sustained injuries to his head, etc., for which he brought this action. Mrs. O'Brien gave it, as her opinion, "that if the wire had been on it had been all right for the boy."

From her own description it is perfectly obvious the wire screen was not placed there to catch people or prevent their falling through the skylight, but for the purpose of saving the glass in the skylight.

The plaintiff recovered a verdict, which has been affirmed at the General Term, and the defendant appeals here.

Upon the case, as made by the plaintiff, we are unable to see that any proof was given of the violation of any duty which the defendant owed to the plaintiff.

The roof over the saloon or the skylight therein was not a dangerous structure, and defendant had given no invitation and issued no license, expressed or implied, to plaintiff to go upon the roof. Mrs. O'Brien had the right to go on it for the purpose suggested, and very likely any agent or servant of hers engaged in that occupation for her. This is no such case. If there had been no roof at this place the plaintiff

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would, on falling out of the window, have come to the ground. Can it be contended in such case the defendant would have been liable? If not how is his liability increased by the fact that there is a roof just below these windows, but in it there is a skylight which a child's weight could break? If the defendant owes no duty in the one case to build a roof or a wall or any other structure under these windows to catch people who fall out of them, how is his liability increased when he does build a structure with a roof but which does not absolutely prevent one from falling through it because of a skylight?

But the liability seems to have been placed in the court below upon the duty which it is said the defendant owed Mrs. O'Brien to furnish her a reasonably safe roof when he let her the right to go upon it to dry clothes. If that be assumed we do not see how plaintiff is aided. Mrs. O'Brien was not injured, nor any of her servants by reason of the unfitness of the roof for the purpose for which it was to be used by her or them. The plaintiff was not injured while he was using the roof at all. He simply fell out of a window (as the evidence shows beyond all question), and thus received his injury. What had the liability (whatever it was) of defendant to Mrs. O'Brien to do with this question between plaintiff and himself, as the plaintiff was not using the roof for any purpose whatever? Conceding that to fulfill his obligations to Mrs. O'Brien and to render the roof fit for her to use for the purpose spoken of, this wire screen was a necessity, and that if it had been there on this occasion the plaintiff would not have been hurt, still there was no duty owing by him to this plaintiff to have the roof in that condition, so that he could be caught when he fell out of the window and the injury thus be averted. The duty of defendant to Mrs. O'Brien, in order to fulfill his contract with her in granting her permission to use the roof is one thing, but the plaintiff cannot take advantage even of its violation unless at the time when the accident happened he was himself in some way connected with her, as in the performance of the duty for her, or in using the roof with her

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license (even if that would raise a duty) and in carrying out some right which she had herself.

This case has none of these features. The duty of defendant may be one thing to Mrs. O'Brien and quite another to the plaintiff. (*Larmore v. Crown Point Iron Co.* (101 N. Y. 391.)

We think this case not distinguishable in principle from *McAlpin v. Powell* (70 N. Y. 126).

The judgment of the General Term and of the Circuit should be reversed and a new trial ordered, costs to abide event.

All concur.

Judgment reversed.

ORLANDO J. CHILDS et al., Respondents, v. HARRIS MANUFACTURING COMPANY, Appellant.

Defendant, a corporation created under the laws of, and doing business in, another State, sold to plaintiffs, who were doing business in this State, certain agricultural implements, with an agreement to indemnify and defend them from all prosecutions because of any alleged infringement of any patent in selling the implements, provided notice was given to it, and it was allowed to take charge of the case. An action having been so commenced against plaintiffs they notified defendant and required it to take charge of the defense; this it did not do, and judgment was rendered against plaintiffs in that action. The summons in an action upon the guaranty was served in this State upon a director of the defendant. On motion to set aside the service, *held*, that the cause of action arose in this State and the summons was properly served (Code of Civ. Proc., § 482, subd. 3); also *held*, that for the purposes of the motion the records of defendant showing the election of the person upon whom service was made as a director, were sufficient to establish that he was one in fact.

(Argued February 1, 1887; decided March 1, 1887.)

APPEAL from order of the General Term of the Supreme Court, in the fourth judicial department, made November 9, 1886, which affirmed an order of Special Term, denying a motion to set aside service of summons herein.

The facts, so far as material, are stated in the opinion

Statement of case.

Louis Marshall for appellant. The plaintiff's alleged cause of action did not arise within the State of New York, since the contract upon which it is based was made in Wisconsin, their demand of performance was also made there, and the breach, if any occurred, took place in that State. (*Bk. of Augusta v. Earle*, 13 Pet. 519; *La Fayette Ins. Co. v. French*, 18 How. [U. S.] 409; *Adams v. Lurdell*, 1 B. & A. 681; *Mactier's Adm'rs v. Frith*, 6 Wend. 104; *Perry v. Mt. Hope Iron Co.*, 5 Abb Rep. 632; *Hallock v. Commercial Ins. Co.*, 26 N. J. L. 268; De Colyar on Guarantees, 220; *Preston v. Yates*, 17 Hun, 92; *S. C.*, 24 id. 524; *Thomas v. Hubbell*, 15 N. Y. 407; *Bridgport Ins. Co., v. Wilson*, 34 id. 278, 281; *Douglass v. Howland*, 24 Wend. 35; *Buckle v. Eckhart*, 3 Denio, 279; *S. C.*, 3 N. Y. 132; *Hib. Nat. Bk. v. Lacombe*, 84 id. 367; *Durham v. Spence*, L. R. 6 Exch. 46; *Western Bk. v. City Bk. of Columbus*, 7 How. Pr. 238; *Campbell v. C. & St. L. R. R. Co.*, 18 id. 412; *Whitehead v. B. & L. H. R. R. Co.*, id. 233; *Duquesne Club v. Penn. Bk.* 35 Hun, 390; *C. Roll. M. Co. v. Swede Iron Co.*, 32 N J L. 15.) At the time of the service of the summons upon him, James B. Crosby was not a director of the defendant corporation, and service upon him was not, therefore, service upon the defendant, irrespective of the question of where the cause of action arose. (*Squires v. Brown*, 22 How. Pr. 44; *Chandler v. Hoag*, 2 Hun. 613; *Ervin v. Oregon Steam Nav. Co.*, 22 id. 598; *Van Amburg v. Baker*, 81 N. Y. 46; *Philadelphia & R. C. & I. Co. v. Hotchkiss*, 82 N. Y. 471; *Osborn, v. Croome*, 14 Hun, 165; *Cameron v. Seaman*, 69 N. Y. 396; *St. Clair v. Cox*, 106 U. S. 354; *McQueen v. Middleton M'f'g Co.*, 16 Johns. 5; *Peckham v. North Parish, etc.*, 16 Pick. 274; Morawetz on Private Corp. [1st ed.] § 523; *Plimpton v. Bigelow*, 93 N. Y. 599; *La Fayette Ins. Co. v. French*, 18 How. [U. S.] 404; *Newell v. G. W. R. R. Co.*, 19 Mich. 344; *Good Hope Co. v. R. Barb Fencing Co.*, 22 Fed. Rep. 635; *U. S. v. Am. Bell Tel. Co.*, 29 id. 17; *Pope v. Terre H. Car M'f'g Co.*, 87 N. Y. 137; *Moulin v. Trenton Mut. Ins. Co.*, 24 N. J. 234.) The director

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referred to in subdivision 3 of section 432 is a director resident within or transacting business within the State. (*Cowson v. Doland*, 2 Daly, 66; 2 Inst. 50; 8 B. & C. 94; Dwarrior on Stat. 704; *Hart v. Kennedy*, 14 Abb. Pr. 432; *Wakefield v. Fargo*, 90 N. Y. 218; *St. Clair v. Cox*, 106 U. S. 357; *Newell v. Gt. W. R. R. Co.*, 19 Mich. 344.)

H. J. Cookinham for respondents. The cause of action arose in this State. (*Hills v. B. & M. R. R. Co.*, 70 N. Y. 223; *Hib. Nat. Bk. v. Lacombe*, 84 id. 367.) Crosby was, at the time the summons was served upon him, a director of the defendant. (*Hiller v. B. & M. R. R. Co.*, 70 N. Y. 223.)

DANFORTH, J. The facts presented by this appeal are as follows: The defendant, a corporation created under the laws of Wisconsin, has its office in that State, where it is engaged in the manufacture and sale of harrows, some of which were bought by the plaintiffs, who are dealers in agricultural implements. Some question arose as to whether the machine was an infringement upon letters patent issued to other parties, and upon a consideration deemed sufficient, the defendant, by writing, executed in Wisconsin, guaranteed to the plaintiffs the right to purchase, sell and deal in their harrow, and to indemnify and defend them from all prosecutions for so doing, by any person claiming it to be an infringement upon any patent, provided notice be given of such proceeding, and they be allowed to take charge of the case. An action was commenced for this alleged cause against these plaintiffs, and they at once notified the defendant and required it to take charge of its defense. The guarantors failed to do so, and judgment went against these plaintiffs for \$3,154.45, payment of which was enforced by execution. They thereupon issued a summons as in the Supreme Court of this State, and served it upon one Crosby in the city of New York, upon the assumption that he was director of the corporation.

The defendants moved the court to set it aside upon the grounds (1.) that the defendant is a foreign corporation, and

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the service was not upon the president, treasurer or secretary of the defendant, or otherwise its representative for that purpose; (2.) that the corporation has no property within this State; and (3.) that the plaintiff's alleged cause of action did not arise within it. The motion was denied at Special and General Terms and this appeal taken. We think it must fail.

It is enough if the cause of action arose in this State, and Crosby was in fact one of defendant's directors. (Code, § 432, subd. 3.) As to the cause of action. It accrued when the defendant failed to perform its contract, and by reason of its failure, the plaintiffs sustained a loss. These events occurred in this State. The plaintiffs were sued in this State, and here, if anywhere, the defendant was required to defend. It is immaterial that the contract to indemnify was made in Wisconsin, its obligation was to be discharged wherever the plaintiffs were vexed by litigation. It is true, as the appellant contends, that this obligation could only arise upon notice to the corporation of the impending suit, and that such notice was given in Wisconsin.

The plaintiffs were bound to perform this condition where they could find the defendant, and when performed it became a fact in the case, but itself gave no cause of action, nor did one then exist. Its object was to set the defendant in motion. Except for it there could have been no default. But the notice called for performance; that was regulated by the proceedings in this State, where the plaintiffs were sued. The defendant's undertaking was to defend them in that suit, and the cause of action arose, when, for want of a defense, judgment went against them, and it arose at the place where that judgment was recovered. Performance at no other time or place was possible. We think the summons was well served. The evidence tended to show that Crosby was a director by election, and for aught that appeared it might reasonably be held that he was one in fact. The records of the defendant so declare, and, for the purposes of the motion now made by it, that declaration is sufficient.

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It follows that the order appealed from should be affirmed, with costs.

All concur, except RUGER, Ch. J., not voting.

Order affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant v.
JOHN E. O'SULLIVAN, Respondent.

104	581
115	454
104	481
123	235

Upon the trial of an indictment for rape it is proper to prove by the complainant, after she has testified to the commission of the offense charged, a prior unsuccessful attempt upon her, by the defendant, to commit the same crime.

104	481
162	275
162	541
162	548

The testimony of the complainant on such a trial was to the effect that the offense was committed upon her by defendant, a Catholic priest, in his house, where she was employed as a servant, on May 6, 1884; that she remained in his service until August twentieth thereafter without disclosing the facts in any manner to any one, although she had full and free communication with her friends. She left defendant's employ not on account of the offense, but because the defendant whipped her for some fault. She went home to her foster parents and remained with them until September tenth, and then went to work in a situation procured for her, at her request, by defendant, and while living there on March 28, 1885, disclosed for the first time the offense, to a Catholic priest at confession. Testimony as to the disclosure was received under objection and exception. The only excuse for the delay in making the disclosure given by the complainant was that after the assault upon her she voluntarily went to the defendant's confessional, while living with him, on several occasions, and confessed to him, and on each occasion he asked her if she had told any one, and on her answering in the negative, he said "God bless you, my child." Also, that while she lived with him he told her it was a sin to "tell on a priest," and if she did, she would go to hell or purgatory; that she did not go to confessional afterward until the time when she made the disclosure. *Held*, that testimony as to the disclosure so long after the offense was improperly received.

104	481
77	AD*189

A disclosure in a case of rape has no value whatever, unless it is the natural result of the horror and sense of wrong which would prompt any virtuous female to make an outcry at the first suitable opportunity.

(Argued February 2, 1886; decided March 1, 1887.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made November 9,
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1886, which reversed a judgment of the Court of Oyer and Terminer in and for the county of Onondaga, entered upon a verdict convicting the defendant of the crime of rape.

The material facts are stated in the opinion.

Ceylon H. Lewis for appellant. The court did not err in allowing the people to give evidence, under defendant's objection, of an assault by defendant, and his attempt to commit a like offense on the person of the prosecutrix, four days prior to the offense charged. (Wharton's Crim. Ev. 35, 46, 49; *State v. Knapp*, 45 N. H. 156; *Strang v. People*, 24 Mich. 6; *Sharp v. State*, 15 Tex. App. 171; *Reg. v. Rearden*, 4 F. & F. 76; *Reg. v. Jones*, 4 L. R. 154; *Rex v. Chambers*, 3 Cox Cr. C. 92; *Williams v. State*, 8 Hump. 585; *State v. Walters*, 45 Ia. 389; *People v. Dohring*, 59 N. Y. 382; 2 Bishop's Crim. L. [7th ed.] 1122, 1125; *Conkey v. People*, 1 Abb. App. Dec. 420; *People v. Jennes*, 5 Mich. 316; *Com'rs v. Nichols*, 114 Mass. 285; *Com'rs v. Lahey*, 14 Gray, 92; *Com'rs v. Merriam*, 14 Pick. 518; *State v. Marvin*, 35 N. H. 22; *State v. Wallace*, 9 id. 513; *State v. Way*, 5 Neb. 287; *Lawson v. State*, 20 Ala. 65.) Evidence was properly received of the fact, that on the 28th day of March, 1885, the injured girl made a disclosure of the injury. (*Baccio v. People*, 41 N. Y. 269; *People v. Clemons*, 3 N. Y. Crim. R. 571; *Mallett v. People*, 3 Hawley, 379; Wharton's Crim. Ev. 273; 3 Greenlf. on Ev. 213; 1 Hale's P. C. 633; 4 Blackst. Com. 214; 3 Chitty's Crim. L. 812; *Higgins v. People*, 58 N. Y. 379; *State v. Byrne*, 47 Conn. 466; *State v. De Wolf*, 8 id. 99; *Maillet v. People*, 3 Hawley, 382.)

John C. Hunt for respondent. The court erred in receiving evidence from the prosecutrix of an actual assault with intent to ravish, committed by the defendant four days prior to the occurrence on trial. (*People v. Corbin*, 56 N. Y. 363, 365; *People v. Kennedy*, 32 id. 141, 144; *Copperman v. People*, 56 id. 591; *People v. Brown*, 72 id. 574; *People v. Crapo*, 76 id. 291; *Cancross v. People*, 17 Week. Dig. 383,

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385.) It was error to allow the prosecutrix to state, under defendant's objection and exception, that she told of the transaction March 28, 1885, more than ten months after its alleged occurrence, to a Catholic priest in Syracuse. (*Baccio v. People*, 41 N. Y. 265, 269, 270, 271.)

EARL, J. The defendant was convicted in the Onondaga Oyer and Terminer of the crime of rape, committed upon Abbie O'Connor, on the 6th day of May, 1884. He was a Roman Catholic priest, in charge of a church at Camillus, in Onondaga county. The complainant was a domestic working for him in the parsonage, which adjoined the church. She testified that she was, at the time of the alleged crime, about seventeen years old; but there was other evidence, apparently more reliable, that she was about twenty. Before she went to live with him, she resided with her foster parents, who brought her up from infancy, and she and they were members of and regular attendants at his church. She went into his service on the twenty-fifth day of January, 1884, and from that time forward, his family consisted of himself, Mrs. Doehner, his housekeeper, Timothy O'Sullivan, his man servant, and the complainant.

She testified that the defendant entered her bedroom in the night-time, and there outraged her. At that time, the housekeeper was in New York, and she was alone in the house with him and the man servant. No criminal complaint was made against him until November, 1885, and he was not indicted until January, 1886.

Upon the trial, after the complainant had testified to the rape, she was permitted, against the defendant's objection, to testify that four days previously he made an attempt to ravish her, that she resisted him, and that he failed. For the reception of this evidence, the court at General Term, as appears by the opinion there pronounced and concurred in by a majority of the judges, reversed the conviction, holding that it was incompetent upon the trial of the defendant for the crime alleged to prove any other crime committed or

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attempted by him. We do not agree with the learned General Term in the view thus taken of this evidence. It is quite true that it is a general rule of law that upon the trial of a prisoner for one offense it is improper to prove that he has been guilty of other offenses; as where a prisoner is put upon trial for larceny, or burglary, or murder, it is incompetent to prove that he has been guilty of other larcenies or burglaries or murders, or other crimes. In this case, it would have been incompetent to prove that the defendant had committed or attempted to commit a rape upon any other woman. But where a prisoner is tried for a particular crime, it is always competent to show, upon the question of his guilt, that he had made an attempt at some prior time, not too distant, to commit the same offense. Upon the trial of a prisoner for murder it is competent to show that he had made previous threats or attempts to kill his victim. (*People v. Jones*, 99 N. Y. 667.) Upon the same principle it must always be competent to show that one charged with rape had previously declared his intention to commit the offense, or had previously made an unsuccessful attempt to do so. In this case if witnesses, other than the complainant, could have been called, who witnessed the unsuccessful attempt of the defendant to ravish the complainant four days before the crime was in fact accomplished, no one would have questioned the competency of their evidence. And the evidence is not rendered incompetent because it comes from the complainant herself. It is not as valuable, or trustworthy, or important, as if it had come from other witnesses. It probably did not have a very important bearing with the jury, because, unless they believed her evidence as to the principal offense they would not believe her evidence as to the prior attempt. But it may have had some tendency to corroborate her story, as to the principal offense, and thus may have had some weight with the jury. But whether it was important or not there is no rule which condemns it, and there is abundant authority to justify its reception. (*Wharton's Crim. Ev.* 35, 46, 49; *State v. Knapp*, 45 N. H. 148, 156; *Strang v. People*, 24 Mich. 16; *Sharp v. The*

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State, 15 Tex. App. 171; *Regina v. Rearden*, 4 F. & F. 76; *Regina v. Jones*, 4 Law Rep. 154; *Rea v. Chambers*, 3 Cox Cr. C. 92; *Williams v. The State*, 8 Humph. 585; *State v. Walters*, 45 Iowa, 389; *Com'rs v. Nichols*, 114 Mass. 285; *Com'rs v. Lahey*, 14 Gray, 92; *Com'rs v. Merriam*, 14 Pick. 518; *State v. Marvin*, 35 N. H. 22; *State v. Wallace*, 9 id. 515; *State v. Way*, 5 Neb. 287; *Lawson v. The State*, 20 Ala. 65.)

We do not agree, therefore, that the judgment should have been reversed on account of the reception of the evidence alluded to. But there is at least one other error disclosed by the record for which, we think, the conviction ought to have been reversed.

As before stated, the alleged rape was committed in defendant's house, on the 6th day of May, 1884. The complainant remained in his service from that time until the twentieth day of August following, without, in any manner, by speech, action or appearance, disclosing or intimating to any one that she had suffered this great wrong. During that time she visited her foster parents, whose place of residence was not far distant from Camillus, and saw them nearly every Sunday at church and at defendant's house, having full and free communication with them in defendant's absence. When she left the service of the defendant it was apparently not on account of the crime that had been committed upon her, but because he whipped her for some trifling offense. Then she went home to live with her foster parents, and remained there until the tenth day of September, and then she went to Syracuse to work in a situation procured for her, at her request, by the defendant; and while living there, on the twenty-eighth day of March, she disclosed to Father Moriarty, a Roman Catholic priest, at confessional, that the assault had been committed upon her; and that was the first disclosure of the crime made by her to any person. Her testimony, as to this disclosure, was objected to and received under objection and exception. During all the time, from the sixth of May to the twenty-eighth of March, nearly eleven months,

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there was not a day when she could not have made a disclosure to some one. She was at perfect liberty to leave the defendant's house at any time, and she remained there of her own free will and consent. The only excuse put forth for the great delay in making the disclosure is based upon the following facts: She testified that after the assault upon her she went voluntarily, and without any solicitation of the defendant, to his confessional and confessed to him, while living with him, on three different occasions; and that on each occasion he asked her whether she had told anything about the assault upon her, and she replied, "no, father," and he said, "God bless you, my child." She also testified that while she lived with him he told her it was a sin to "tell on a priest," and that if she ever "told on a priest" she would go to hell or purgatory. She further testified that she did not go to confessional again until the 28th day of March, 1885, when she made the disclosure to Father Moriarty, and that she told him about it the first time she went to his confessional.

It may well be that the fact that this disclosure was made at the confessional under the sanction of religion, gave it additional weight with the jury. But we are of opinion that such a disclosure made nearly eleven months after the commission of the alleged assault was too remote to be received in evidence. There was nothing whatever to justify the delay.

It is a general rule that the evidence of a witness can never be corroborated or confirmed by proof that the witness stated the same facts testified to in court on some occasion when not under oath. Such statements, like all hearsay evidence, are excluded as unsatisfactory and incompetent. But there is an exception to the rule in the case of rape. The outrage in such a case upon a virtuous female is so great that there is a natural presumption that at the first suitable opportunity she would make disclosure of it; and she would be so far discredited if she did not make the disclosure, for the purpose of confirming her evidence where she is a witness, such disclosure may be received. But where the disclosure is not

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recent, as soon as suitable opportunity is furnished, the reason for receiving it in evidence does not exist, and the principle justifying its reception does not apply. In 1 Hale's Pleas of the Crown, 632, it is said that the "complainant must make fresh discovery and pursuit of the offense and offender, otherwise it carries a presumption that her suit is but malicious and feigned." In 1 East's Pleas of the Crown, 445, it is said that the evidence of the complainant "is confirmed if she presently discovered the offense and made pursuit for the offender; and that "her evidence is discredited if she concealed the injury for any considerable time after she had opportunity to complain," and the same language is substantially embodied in 4 Blackstone's Commentaries, 214. In *Baccio v. People* (41 N. Y. 265), the defendant was indicted for rape, and upon the trial the prosecution was permitted to give evidence that the complainant disclosed the crime to her mother twenty-four days after its commission, and the conviction in that case was reversed on the ground that the mother of the complainant was permitted to testify in detail on her direct examination to the statements made to her by the complainant of the time and manner of the offense. Judge WOODRUFF, writing the opinion, said: "I was at first inclined to say that evidence of any complaint made so long after the alleged injury, and especially when forced from the daughter by the mother after her daughter had once declared that her injury was due to a fall, should not have been received at all from any person. The complaint was certainly not made recently after the alleged outrage. But in a case in which the fact of complaint is admissible, it is perhaps competent to explain the want of such early complaint by facts which show that it was impracticable, or that it was prevented by circumstances consistent with the natural impulse to complain thereof, so far at least as to destroy the presumption of falsehood derivable from concealment on the part of the female." In the course of his opinion the same learned judge said, that the rule admitting such declarations in cases of rape is an exception to the general rule

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excluding declarations made out of court, by a person who has been or might be examined as a witness, and is properly confined within narrow limits; and he suggested that the reason for the admission of such declarations is, "that it is so natural as to be almost inevitable, that a female upon whom the crime has been committed, will make immediate complaint thereof to her mother, or other confidential friend; and, inasmuch as her failure to do so would be strong evidence that her affirmation on the subject, when examined as a witness, was false, that the prosecution may anticipate such a claim by affirmative proof that complaint was made."

In *Higgins v. People* (58 N. Y. 377), the defendant was indicted for rape. In that case it appeared that the prosecutrix arrived in New York, an entire stranger, and having lost her baggage, she was inveigled into a basement on a pretense of finding it, where she was outraged. Upon coming out into the street she met a woman who asked her what was the matter, also a policeman who took her to the station house. To neither of these did she state the real offense; but it appeared that as soon after arriving at the station house as her excitement would admit, she stated the fact to the police captain. Upon these facts defendant's counsel requested the court to charge that, "if the jury believe the prosecuting witness did not make prompt disclosure of the alleged wrong, it is a circumstance against her, casting a great discredit on her testimony and tends strongly to disprove the truth of the accusation." This the court refused to charge, and it was held, that, conceding the proposition to be entirely accurate, it was an abstract one, as there was no ground for saying that the disclosure was not sufficiently prompt, and it was not error, therefore, to refuse so to charge. CHURCH, Ch. J., writing the opinion, said: "The proposition which the court was requested to charge was substantially correct, although it is quite general and somewhat vague. Any considerable delay on the part of a prosecutrix to make complaint of the outrage constituting the crime of rape, is a circumstance of more or less weight, depending upon the other surrounding circum-

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stances. There may be many reasons why a failure to make immediate or instant outcry should not discredit the witness. A want of suitable opportunity, or fear, may sometimes excuse or justify a delay. There can be no iron rule on the subject. The law expects and requires that it should be prompt, but there is, and can be, no particular time specified. The rule is founded upon the laws of human nature, which induce a female thus outraged to complain at the first opportunity. Such is the natural impulse of an honest female."

In Connecticut a more liberal rule as to disclosures made by a prosecutrix has been adopted than prevails in this State. (*State v. De Wolf*, 8 Conn. 93; *State v. Byrne*, 47 id. 465.)

There it may be proved, not only that she made disclosures of the crime, but the details of the crime as she disclosed them may also be proved. In the two cases cited, the disclosures were made after a much longer time than in any other case which has come to our attention. In the first case the complainant was deaf and dumb, and the disclosure was made more than a year after the commission of the crime. But there she was prevented from making the disclosure by the threats and influence of the prisoner over her, and it was held, that her mental and physical condition were such as to furnish her an excuse for not making an earlier disclosure. In the other case the complainant did not make the disclosure until more than a year and a half after the commission of the crime. But she was only twelve years old, and the defendant was her step-father, and she was living in his family, and he threatened to take her life if she told her mother or anybody else what had happened. Under such circumstances it was held to be for the jury, in weighing her evidence, to determine what effect should be given to her failure to make an earlier disclosure.

It will be seen from these authorities that the very reason upon which the rule is based for the reception of such evidence, requires that the disclosure should be recent and made at the first suitable opportunity. But there may be circumstances which will excuse delay, as when the prosecutrix is

under the physical control of the defendant, when she is among strangers and there is no one in whom she can confide, when she is induced to silence by threats, and is so far within the power or reach of the defendant that the threats may be executed. In such and other like cases delay may be excused, and the disclosure may be proved, and all the facts submitted to the jury for them to determine what weight shall be given to the disclosure, and what effect the delay shall have. But here there was absolutely nothing to justify the great delay. There was no time after the commission of the offense when she could not have left the defendant's house. She was of mature age and near her friends and saw them frequently. She was in Syracuse, having access to priests months before she made the disclosure. It does not appear from her evidence that she delayed the disclosure from fear of the defendant, or from any influence of superstition, or from the apprehension of consequences to herself in this life or in the life to come.

We think the delay, under such circumstances, was so great and so unjustifiable that as matter of law the disclosure should have been excluded as evidence, and that it was therefore error to receive it. If this disclosure was competent, then no disclosure, however distant from the time of the offense, could be excluded; and all such disclosures would have to be received and submitted to the jurors for such damaging effect as they would allow them to have. A disclosure at such a distant time is of no more value in a case of rape than it would be in a case of robbery, attempted murder, or any other crime. A disclosure in a case of rape has no legal value whatever unless it is the natural result of the horror and sense of wrong which would prompt every virtuous female to make outcry at the first suitable opportunity.

Our attention has also been called to error in the charge of the learned trial judge. We have carefully considered the charge and are constrained to believe that it was in part erroneous. But, as we have reached the conclusion that for the error to which we have given particular attention the convic-

Statement of case.

tion was properly reversed, it is unnecessary to further notice the charge, as the error complained of is not likely to be repeated upon the new trial, if one should be had.

We, therefore, conclude that the order of the General Term should be affirmed.

All concur.

Order affirmed.

104	491
114	138
104	491
148	684

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
PETER SMITH, Appellant.

Where, upon the trial of an indictment for murder, the admissibility of statements made by the deceased, which are offered in evidence as dying declarations, is brought in question, it is the duty of the court to determine, as a preliminary issue, whether the alleged declarations were made by the deceased under a conviction of approaching and imminent death.

Such preliminary examination may, in the discretion of the court, be conducted in the presence of the jury; but during it they stand simply in the attitude of spectators; with the testimony given they have no concern, it being merely for the information of the court, and until by its ruling some portion of it is presented to the jury as competent evidence in the case, there is nothing to which the defendant may except as constituting legal error. (ANDREWS and PECKHAM, JJ., dissenting.)

An exception, therefore, may not be based upon the reception in evidence upon such preliminary examination of statements of the deceased, not relating to the immediate circumstances of the death, which is not so presented to the jury. (ANDREWS and PECKHAM, JJ., dissenting.)

It is within the discretion of the court to determine how far the examination shall extend. The exercise of that discretion is reviewable by the General Term, but not by this court; unless it appears that such discretion was abused, and the action of the court arbitrary and unreasonable.

(Argued December 2, 1886; decided March 1, 1887.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made June 28, 1886, which affirmed a judgment of the Court of General Sessions in and for the city and county of New York, entered upon a verdict convicting the defendant in error of the crime of murder in the first degree.

The facts are stated in the opinion.

Statement of case.

Arthur C. Palmer and *John O'Byrne* for appellant. To render a statement admissible as a dying declaration, it is not enough that it appears that the person making it was under the impression that death must ultimately ensue, but it is necessary that it should appear that the person was conscious at the time that death was actually imminent. (*Reg. v. Forrester*, 4 F. & F. 857; 10 Cox Crim. C. 368; *Reg. v. Osman*, 15 id. 1; *Maine v. People*, 9 Hun, 113; 1 Greenlf. on Ev., § 158; Roscoe's Crim. Ev. 31; *People v. Robinson*, 2 Park, 246; *Rex v. Van Butchell*, 3 C. & P. 629; *Reg. v. Jenkins*, 11 Cox Crim. C. 250; *Rex v. Crockett*, 4 C. & P. 545; *Reg. v. Dalmas*, 1 Cox Crim. C. 95; *Reg. v. Peel*, 2 Fos. & Fin. 21; *Rex v. Hayward*, 6 C. & P. 160; *Rex v. Spilsbury*, 7 id. 180; *Reg. v. Nicholas*, 6 Cox Crim. C. 120; *Reg. v. Megson*, 9 C. & P. 418; *Rex v. Fagent*, 7 id. 238; *R. v. Christie*, Cas. Supp. C. L. 202; *Wellman's Case*, 1 East's C. L. 358; *Wilson's Case*, 1 Lewin, 78; *Errington's Case*, 2 id. 148; *State v. Medlicott*, 3 Kan. 257; *King v. Comm.*, 2 Va. Cas. 78, 80; *Smith v. State*, 9 Humph. 25; *Lewis v. State*, 9 S. & M. [Miss.] 120; *Robins v. State*, 8 O. [N. S.] 163; *Brakefield v. State*, 4 Sneed [Tenn.], 218; *McPrisson v. State*, 9 Yerger [Tenn.], 279.) The alleged dying declaration as to circumstances disconnected with the crime, was not admissible. (*Lambert v. State*, 23 Miss. 323; 1 Greenlf. on Ev., § 156; *People v. Davis*, 56 N. Y. 96; *Waldele v. N. Y. C. & H. R. R. Co.*, 95 id. 275; 19 Hun, 69; 14 Crim. L. R. 817; 15 id. 1, 70, 104; *Chapin v. Marlborough*, 9 Gray, 244; *Rockwell v. Taylor*, 41 Conn. 59; *Teeley v. J. & R. R. Co.*, 17 N. Y. 131; *State v. Davidson*, 30 Vt. 377; Greenlf. Ev., § 110; *People v. Davis*, 56 N. Y. 95; *Ins. Co. v. Mosely*, 8 Wall. 397.) The alleged dying declaration as to what Sweeney said and did was not admissible. (Wharton on Homicide [ed. of 1858], 307; id. [1st Taylor's Ed.] 542, § 530; *Nelson v. State*, 7 Hump. 542.) If evidence which is inadmissible is introduced an error is committed which is not cured by striking the same out, provided the same was prejudicial to the prisoner. (*People v. Zimmerman*, Daily Reg., Sept. 14,

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1886.) It was the duty of the court to determine whether, upon the facts proved, the statement of the deceased was competent. Its decision upon that question is a matter of law, and may be reviewed. (1 Whar. Crim. L., § 681; 1 Greenlf. Ev., § 160; *Donnelly v. State*, 2 Dutch [N. J.], 463; 601.) Declarations must state facts, not opinions. (Starkie on Ev. [10th ed.], § 38.)

McKenzie Semple for respondent. The declarations admitted in evidence as the dying declarations of John Hannon were made under a sense of impending and immediate dissolution, and without hope of recovery, and were competent. (*People v. Sweeney*, 4 N. Y. Crim. R. 275; *Reg. v. Howell*, 26 L. J. M. C. 43; *Rex v. Mosely*, 1 Lewin C. C. 99; *Maine v. People*, 9 Hun, 113, 115, 116; *Brotherton v. People*, 75 N. Y. 159; *People v. Robinson*, 2 Park. 236.)

FINCH, J. We all agree in this case that no error was committed upon the trial, unless as to the single point which, in the opinion of ANDREWS, J., is deemed sufficient ground for ordering a new trial. That opinion states fully and accurately the facts disclosed by the proofs, and shows that the killing was admitted, and the only issue that remained was whether the fatal shot was accidental or intentional. It further holds that when the admissibility of the dying declarations of Hannon was brought in question, it became the duty of the court to determine, as a preliminary issue, whether the alleged declarations were made by the deceased under a conviction of approaching and imminent death, and that such necessary preliminary examination might, in the discretion of the court, be conducted in the presence of the jury. When the dying declarations of Hannon were offered by the prosecution, the defense objected upon the ground that they were not such. The trial judge answered, in substance, that he could not determine that question until he knew whether or not they were made in anticipation of approaching death. The defense then claimed a right to cross-examine "upon that point."

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The judge answered, "not just yet," and finally said, before the preliminary examination began, "when the district attorney gets the statements of the witness you may cross-examine and I will *then* determine whether it comes within the rule." At this stage of the case there seems to have been no room for a misunderstanding as to what was at the moment before the court. It was an issue of law to be determined by the court upon facts addressed to it and with which the jury had nothing whatever to do. The defense so understood it, for they sought to enter at once upon a cross-examination of the witness on that point. Everybody understood that the admission of any declarations of Hannon was stayed and barred, until, upon the examination by the prosecution and the cross-examination by the defense, the issue of admissibility should be tried and determined by the court. During the trial of that preliminary issue the jury stood merely in the attitude of spectators. They had no concern with it, and knew from the statements of the court that they had not. They understood that out of its result something might come before them as evidence, or nothing, and that until the judge ruled, the facts developed were for his consideration and not for theirs. The fact that their presence was not error shows that, in the judgment of the law, a jury must be deemed capable of that amount of discrimination at least. And thus the trial of the preliminary issue before the court was entered upon with the complete knowledge and understanding of all parties. The district attorney proceeded at once to the precise point and proved the statement of Hannon to his mother, that he was "going to die." At the close of about one-half of a printed page, directed to the issue before the court the prosecution said: "Now we think we have laid the foundation for declarations." The judge seems not to have been entirely satisfied. The mother had given to her son the doctor's assurance that he would get well. It had produced no apparent effect at the moment, but who could tell that if the rest of the conversation occurring thereafter should be disclosed there might not appear a hope of recovery born of

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that assurance, or a spirit of hatred and revenge inconsistent with the solemn truth of statements in the presence of death? The prosecution had obtained enough for its purpose, but the court had a duty to its own conscience; a duty not to be hasty or to be misled, and to make sure that it fully and correctly understood the frame of mind of the deceased. The learned judge, therefore, continued the examination, and at some point the district attorney apparently aided in its progress, until the witness had disclosed, not a selected part, but the whole of what deceased said to her during the last two days of his life. Near its close Hannon spoke of the influence of Sweeney with the police. The prisoner's counsel asked the court, "will you admit this?" to which the judge replied: "I have not admitted anything yet; I want to hear the whole statement made by the deceased before I determine whether I will or will not allow the alleged dying declaration in evidence." Nothing could be plainer or more direct than this. All that had been said by the witness was thus again declared to be purely tentative and preliminary, not yet evidence in the case and wholly directed to the enlightenment of the court in the performance of its duty. The statement, thus interrupted, was thereupon finished in a single sentence more of about half a dozen lines. So far, no evidence of Hannon's declarations had been admitted at all. They had been repeated for the information of the court to enable it to perform the duty of ruling whether any, and if so, what portion of them were competent evidence to be submitted to the jury. Until some such ruling was made there could be nothing to which the prisoner could except as constituting legal error. What followed was in some respects out of regular order. The district attorney, dropping the entire subject of the conversations with the deceased, proceeded to examine her, not upon the preliminary issue, but upon matters relating to the main issue and belonging to the consideration of the jury. It would have been more regular to have first finished the preliminary issue. The prisoner's counsel, however, seems to have acquiesced. He had been told that

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he could cross-examine upon the preliminary issue when the prosecutor had finished. That time had come and he was at liberty, if he cared for the order of the proceeding, to interpose and assert the right which the court had promised to give him, and ask a decision of the preliminary issue before the trial proper was resumed. He did not do so. He chose to sit silent while the added proof, competent upon the main issue, was being submitted to the jury. When the district attorney closed his examination of the witness the prisoner's counsel asked three not very important questions, and then turning to the court said: "I move now to strike out all the evidence given by the witness, in regard to the interview with the deceased, upon the ground that it is inadmissible, for the reason that the necessary foundation has not been laid for such declarations." This motion was singularly inapt, except for one purpose. As no declarations had yet been received in evidence there were none to strike out, and the objection was to the whole of them when some were beyond doubt admissible. If the purpose was to draw from the court an admission that they had been received, or an assent to such a claim, that purpose failed, for the court said in answer to the motion: "As I understand the position of the matter now, it is this: Mr. O'Byrne claims the right to cross-examine the witness, in reference to *what will be claimed by the district attorney* as evidence of dying declarations, for the purpose of ascertaining whether it is admissible. Are you cross-examining on that point?" The prisoner's counsel replied: "I am not; I am in a general cross-examination." The answer suggested to the judge the possibility of some confusion, for he at once said: "You may enter on the record that the court will now permit the defendant's counsel to cross-examine the witness before passing upon the question of the admissibility of the alleged dying declarations made by the deceased to the witness, as testified to by her." To this the prisoner's counsel said. "We cannot be estopped by any such record as that; it is a monstrous proposition." Why that should have been said, after what had occurred, it is diffi-

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cult to say. We do not mean to criticise the counsel, who bore the heavy responsibility of his client's life, or misinterpret his zeal, but at least we differ from him entirely. We see in the action of the trial court a steady purpose to keep the evidence of declarations out of the case until at a proper and suitable time it should be determined what, if any, were admissible. The counter-effort seemed to be to insist that the court stood in the position of having admitted in evidence what it is clear was never admitted at all. The cross-examination then proceeded. Before it closed it reverted to the declarations of the deceased, which had been repeated to the court. The witness was asked if she recollected the interview clearly; if she thought her son was dying, why she did not send for a priest on Wednesday; what was the subject matter of deceased's conversation on Thursday, and what was the whole conversation between them. As the witness began to repeat it the counsel suddenly closed his cross-examination. The court then asked if it was finished, and receiving an affirmative answer, proceeded to determine the preliminary issue and decide what portion of the statement of the witness to the court should be admitted, and directed the stenographer to read to the jury, and he did read to them, "so much and such parts thereof as are embraced within black lines," and marked on the margin "allowed to stand as evidence of dying declarations," and ordered the balance to be "stricken from the evidence," and in view of what had occurred took the added pains to caution the jury to disregard what they had heard repeated but what the court decided it would not admit. Upon this state of facts I cannot resist the conviction that the declarations of Hannon, now objected to, were never admitted in evidence, but wholly excluded; and that the case is not at all one in which erroneous proof was first admitted and then sought to be stricken out, but one in which no error of admission existed which required correction. It seems sufficiently evident also that any doubt on the subject, and any confusion or mistake as to what was being done, was steadily and persistently guarded against by the court, and the admissi-

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bility of the proposed evidence determined as soon as it could be done consistently with the right of cross-examination reserved to the defense.

Since there could be no valid exception to the admission of evidence which was never admitted, the only possible inquiry becomes whether the action of the court in acquiring the needed information on which to rule is itself the subject of our review. We do not see how it can be. It rests in the judicial discretion. It never goes to the jury except so far as admitted. Some means of information the court must have. The suggestion made is "that it should have confined the preliminary examination to the facts relating to the declarant's condition of body and mind at the time." That proposition, stated as a general rule for the guidance of trial judges in exercising their discretion, need not be doubted; but the inquiry will remain in each case, under its own peculiar circumstances, how far the examination should extend in order to ascertain with accuracy and reasonable certainty the mental condition and belief of the declarant. The exercise of that discretion was reviewable by the General Term, but is beyond our jurisdiction, unless we can see that such discretion was abused, and the action of the court arbitrary and without reason. We cannot say that. There was a motive which might fairly have operated upon the judicial mind to push the inquiry beyond the point at which the district attorney paused, and that motive was, as we have already suggested, to ascertain whether the assurance of survival, which the deceased had been told the doctors had given, became at any time so operative upon him as to awaken a hope of life. With that circumstance before it, the court might reasonably conclude that a part of what was said would scarcely furnish as safe a basis of judgment as the whole. We can readily see that the determination of the court to hear all that the deceased said before deciding whether any of it was admissible, should not be deemed arbitrary or an abuse of discretion under the existing facts. Suppose that it had turned out, as from what appeared seemed

Dissenting opinion, per ANDREWS, J.

quite possible, that the very last thing said by Hannon, relating not at all to the facts of the shooting, had shown the presence of a lurking but confident hope of recovery. Singularly enough, the prisoner's counsel illustrates the force of what we are saying by claiming in his able brief precisely such a result. He plants himself upon the very last words of Hannon, which closed the conversation with his mother, and which were about Sweeney and the police, and argues that they show a hope of recovery. Hannon said "I am afraid, mother, you will get no satisfaction for your son." She replied, "Johnnie that cant be so" He answered, "I hope so, mother, because I would like to go agin them fellows." The counsel claims that the expression does bear somewhat upon Hannon's frame of mind, and yet, without what preceded it, its occasion and even its accurate meaning might be lost to us. It does not appear to have been deemed sufficiently material by the learned trial judge to have affected his judgment, but he could not have known that in advance; and it is easy to see that it might have assumed a form which would have been very material. The hope of survival, the lingering belief that death is not inevitable, may disclose itself to an observant mind where even the witness does not see it, and may come to the surface when the talk is far away from the facts of the killing, and from the *res gestae*. These suggestions show that the action of the court was, at least, not arbitrary and without some apparent reason, and so its discretion was not abused. The General Term, which had the power to review it, has held that the rights of the prisoner were not prejudiced, and its conclusion must, therefore, prevail.

The judgment should be affirmed.

ANDREWS, J. (dissenting). The defendant was jointly indicted with one Alexander Sweeney, in the Court of General Sessions in the city of New York, for the murder of John Hannon, by shooting with a pistol, April 7, 1885. He was separately tried, and was convicted of murder in the first degree. The trans-

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action took place at about six o'clock in the evening, at a shanty at the foot of Thirty-eighth street, in the city of New York, where the deceased was employed as a watchman in the street cleaning department. The deceased was at the time sitting or lying on a bench in the shanty, and a man named Tracy was in the room, sitting by and leaning upon a table. Tracy saw Smith and Sweeney enter the door, and he pretended to be asleep. He testifies that they had some conversation in a whisper, which was followed almost immediately by the report of a pistol, and they then turned and left the place. Tracy, seeing that Hannon was shot, followed the two men and pointed them out to officers, who arrested them. The shooting was done on Tuesday evening. Hannon was taken the same evening to Bellevue hospital and died there the Saturday following. It was found that a ball had penetrated the skull, over the right eye, entering the brain.

There was no controversy on the trial that the shot proceeded from a pistol in the hands of the defendant. The defense was that the shooting was unintentional and accidental. The testimony of the defendant, who was sworn as a witness in his own behalf, tended to support this explanation. The theory of the prosecution was that it was a deliberate and premeditated murder, committed by Smith and Sweeney, acting in concert, from enmity, each having a grudge against the deceased. The prosecution, in support of this theory, proved that Smith and Sweeney had known each other from boyhood and were intimate friends, and were also acquaintances of the deceased. For the purpose of showing the hostility of Sweeney to the deceased the prosecution was permitted, against the objection of the defendant's counsel, to show that a fight had occurred between them on the day before the homicide. It was also shown by the evidence of the mother and sister of the deceased that about two years prior to the homicide an altercation took place between the defendant and the deceased, during which the former drew a pistol, and that on that occasion the defendant threatened to kill Hannon "if it is twenty years to come." The people

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further, to support the indictment, offered evidence of declarations made by the deceased to his mother at the hospital, on Wednesday morning, the day after the shooting, and also to his sister on Thursday morning.

The principal and serious allegations of error relate to this evidence, *first*, as to whether the declarant made the declarations under a sense of impending death, within the rules governing the admission of dying declarations, and, *second*, whether the court committed a legal error in permitting declarations of the deceased to be proven in the first instance, not relating to the immediate circumstances of the death, and which the court subsequently ordered to be stricken out. In respect to the first question, viz., whether the deceased at the time of making the declarations was in such condition of body and mind, and had such a sense of impending dissolution as to make his declarations admissible, we entertain no doubt. As the sequel proved, he had received a mortal wound. His conversation with his mother indicated that he considered his condition hopeless. He said: "Yes, mother, I am shot; mother, will you take me home; the Bellevue people are good; they are good enough, but they can do nothing for me." The mother said: "Johnny, the doctor don't say so, the doctor says you will get well." He said: "Mother, lift me up, kiss me, kiss me, because I am going to die; the bullet that Pete Smith put in my head, it is in it, and it will fetch me and leave you without your only son." There was other conversation not necessary to repeat. Suffice it to say that all his statements as to his condition, indicate that both on Wednesday and Thursday mornings he had a settled conviction that he was fatally wounded and that death was imminent.

It would not be profitable to go over the cases as to the preliminary proof necessary to entitle dying declarations to be given in evidence. Each case differs in its circumstances, and the cases are not all reconcilable. The rule admitting dying declarations is anomalous, and courts are strict in requiring that, before admitting them, it shall be made clearly

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to appear that the declarant was, in fact, resting under the shadow of death from the fatal stroke, and so believed, entertaining no hope of recovery. The circumstances proved in this case bring it within the rule, according to the best considered authorities. (*Reg. v. Howell*, 26 Law J. [M. C.] 43; *Reg. v. Jenkins*, 11 Cox. Cr. C. 250; *Reg. v. Peel*, 2 Fost. & F. 21; 3 Russ. on Cr. [4th Eng. ed.] 250 *et seq.*; 1 Greenl. Ev. chap. 9.)

The more serious question arises in respect to the alleged error of the court in admitting declarations made by the deceased in relation to matters not the proper subject of proof by dying declarations. The course of the trial upon this point, as disclosed by the record, was this: The mother of the deceased, on being called and sworn as a witness for the people, was asked by the prosecuting attorney to state the conversation she had with the deceased at the hospital on Wednesday morning. The defendant's counsel interposed an objection that it was not "in the nature of an *ante mortem*, and was inadmissible." The court replied, "I cannot determine whether it is or not until I hear it." On the defendant's counsel repeating the objection, the court stated, "Mr. Palmer, rather than you should interrupt at every question put to the witness, you may consider an objection and exception to every question put to the witness." The witness was again asked to state the conversation, when the defendant's counsel asked the court if it had decided to admit declarations of Hannon when not in fear of imminent death, and the court replied that it had not, adding, "How do I know as yet but that they were made in anticipation of immediate death?" The defendant's counsel then asked to be permitted to cross-examine the witness on that point, but the court denied his request, saying that when the district attorney got the statement of the witness, the defendant's counsel could then cross-examine, and the court would decide whether it came within the rule, and to this ruling an exception was taken. The district

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attorney then proved by the mother, the declarations of the son heretofore stated, and said, "Now I think we have laid the foundation for declarations." The court then took up the examination of the witness, and she proceeded, in answer to the questions of the court and the district attorney, to give testimony occupying four printed pages of the case, narrating the whole conversation with her son. Much of the evidence was elicited by answers to specific questions as to declarations having no relation to the *res gestæ* of the homicide. After an examination of the witness, covering twenty printed pages, embracing many subjects other than the interview at the hospital, the court directed the stenographer to read to the jury from his stenographic notes a part of the evidence of the witness pointed out by the court, of the conversation with her son, which embraced the evidence which has been detailed, showing Hannon's expectation of death, and also his declarations as to the circumstances of the murder, and directed that the further evidence of the witness of what transpired at the interview, should be stricken out and disregarded by the jury. The portion of the evidence directed to be read to the jury is inclosed in black lines in the error book, and occupies about a printed page of the testimony. Following the testimony admitted, is the testimony stricken out, which occupies three printed pages. In the testimony stricken out is the following to a question by the mother: "Johnnie, what did they shoot you for?" the deceased replied, "very little cause, mother; but Pete Smith has promised me this for a long time." To another remark by the mother, "Johnnie, how early they went down to shoot you," he replied, "That was their best chance, mother, because the carts never come in with their first loads before seven or half-past seven in the evening; Smith and Sweeney knew the time the loads came in just as well as I did; they thought they would catch me alone." The mother asked, "How came Tracy to be with you, Johnnie?" He answered, "Because I asked him to remain with me all night; I was

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afraid ; I asked Tracy to stay with me ; he said he would stay ; I asked William Curry to remain with me the night before ; he also did stay ; mother, I think I would get shot Tuesday morning only for having William Curry with me." The mother asked, " Johnnie, why do you think that ?" He replied, " Because Sweeney and another man came down in the morning, between five and six, I think it was." The particulars of the interview between Sweeney and deceased on Tuesday morning, as related by the latter, were then called out by specific questions by the district attorney. It appeared from his statement to his mother that Sweeney called the deceased out of the shanty, and Sweeney said, " What talk have you had about what you can do to me and Smith ?" The deceased replied, " I have no talk about what I can do to you." Sweeney then called him a liar, and on the deceased saying, " If you want any more satisfaction, I am man enough for you if I only get fair play." Sweeney said, " We will not mind it now ; we will have another time to fix this." Further declarations of the deceased were proved to the effect that Sweeney and Smith had relatives in the police force, who would be able to prevent the mother " getting any satisfaction for her son."

I am of opinion that the court committed a legal error, under the circumstances, in permitting proof of declarations of the deceased in respect to facts not coming within the class of facts which may be proved by dying declarations, and that the error was not cured by striking these declarations from the record and directing the jury to disregard them. There is no doubt of the proposition stated by the counsel for the people that the question whether circumstances exist which make declarations admissible as dying declarations, is a preliminary fact to be determined by the court, and that it cannot be left to the jury to say whether the deceased thought he was dying or not, for that must be decided by the judge, before he permits the declarations to be given in evidence. This was decided at a conference of all the judges of England in 1790, and has been generally accepted as the rule in this country. (3 Russ.

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on Cr. [4th Eng. ed.], 266, and cases cited; *Donnelly v. The State*, 2 Dutch. [N. J.], 463; 1 Whart. § 681.) It is a necessary result of this doctrine, that the court must in the first instance hear the evidence bearing upon the condition of the declarant and his sense of impending death. If on this inquiry the court determines that the circumstances justify the introduction of dying declarations, then on their being offered the question whether they relate to facts which may be proved by dying declarations, arises and is to be determined by the court in the ordinary way. It is also well settled that dying declarations relating to transactions prior to the homicide, and not a part of the *res gestæ*, are not admissible. The rule is stated by ABBOTT, Ch. J., in *Ree v. Mead* (2 Barn. & Ad., 605), in language often quoted with approval, "that evidence of this description is only admissible where the death of the deceased is the subject of the charge and the circumstances of the death the subject of the dying declaration." (1 Greenl. Ev. § 156; *People v. Davis*, 56 N. Y. 95; *Ins. Co. v. Mosely*, 8 Wall. 397.) The declarations of Hannon to which we have referred, which were stricken out by the court, were clearly inadmissible under the rule, and were calculated seriously to prejudice the defendant. They supplemented with great force the evidence tending to show concert, deliberation and premeditation. We think it was the duty of the court to have confined the preliminary examination to the facts relating to the declarant's condition of mind and body at the time. The whole examination was taken before the jury in the ordinary manner of taking testimony on the trial of an issue. It was, we think, the duty of the court, in fairness to the prisoner, and that a discreet administration of the criminal law required the court, to have called the attention of the witness on the preliminary inquiry, to the particular point to which the inquiry was directed, and not to have permitted her to testify to declarations not only irrelevant to the preliminary fact, but inadmissible on the main issue. The court not only omitted to call the attention of the witness to the point, but refused to

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permit the defendant's counsel to examine her on the preliminary question until after the examination of the district attorney, covering the whole interview, had been concluded. The testimony stricken out was received after all the testimony admitted bearing upon the preliminary inquiry had been elicited. The part stricken out was evidence received subsequent to the evidence retained. A witness called to testify to dying declarations may, on the preliminary examination, through ignorance or want of discrimination, intermingle declarations of the deceased as to her apprehension of death, with declarations relating to the crime. Such prejudice as the defendant might suffer in such a case he would have to bear as an unavoidable incident of the trial. But that is not this case.

We think the judge erred, and that according to the suggestion of the court, made to counsel on the trial, an exception must be deemed to have been taken to the objectionable evidence, and we think it quite clear that the error was not cured by striking it from the record and instructing the jury to disregard it. (*Erben v. Lorillard*, 19 N. Y. 299; *Lindsay v. People*, 63 id. 143, 154, ALLEN, J.; *Furst v. Second Ave. R. R. Co.*, 72 id. 542.)

The judgment and conviction should, therefore, be reversed and a new trial granted.

All concur with FINCH, J., except ANDREWS and PECKHAM, JJ., dissenting.

Judgment affirmed.

WILLIAM H. NEARPASS et al., as Administrators, etc., Appellants, v. WINTHROP W. GILMAN, Respondent.

In an action by executors or administrators against the maker of a note or the drawer of a check, executed for defendant by his agent, where the defense is payment, the agent is not precluded from testifying on behalf of his principal to personal transactions and communications

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with the decedent showing payment by the agent; he is not "interested in the event" within the meaning of the Code of Civil Procedure (§ 829).

In such an action the indorser of the paper, not a party, is also a competent witness for the defendant as to such transactions or communications, where it does not appear that he has been charged as indorser; his indorsement simply does not make him even presumptively liable, and, until presentation, protest and notice is shown, he does not stand in the attitude of one interested in the event.

(Argued January 31, 1887, decided March 1, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 10, 1878, which affirmed a judgment in favor of defendant, entered upon the report of a referee. (Reported below, 16 Hun, 121.)

The nature of the action and the material facts are stated in the opinion.

John W. Lyon for appellants. The entire testimony of Alfred Gilman, given upon the trial of this cause as to personal transactions and communication with plaintiffs' intestate was incompetent and inadmissible, he being the general agent of the defendant and having transacted all the business in relation to the matters in suit for the defendant. (*Mattoon v. Young*, 45 N. Y. 695, 699; *Head v. Tuter*, 10 Hun, 548; *Wooster v. Booth*, 2 Hun, 426.) In the event of the defeat of the defendant in this action, Alfred Gilman was liable to defendant and could have been proceeded against. (*Stoll v. King*, 8 How. 298; *Noble v. Prescott*, 4 E. D. Smith, 139; *Farnsworth v. Ebbs*, 2 Hun, 438; *Church v. Howard*, 79 N. Y. 420; Code of Civ. Pro., § 829; *Sanford v. Ellithorp*, 95 N. Y. 53; *Holcomb v. Holcomb*, id. 324; *Willis v. Montgomery*, 78 id. 282; *Hill v. Hotchkiss*, 23 Hun, 416; *Poucher v. Scott*, 33 id. 230; *Steele v. Ward*, 30 id. 555; *Allen v. Blanchard*, 9 Cow. 633; *Butler v. Warren*, 11 Johns. 58.) Assuming that Freedman was the indorser of the note inquired of, he was an incompetent witness. (*Richardson v. Warner*, 13 Hun, 13; *Hildebrand v. Crawford*, 65 N. Y. 107; *Farnsworth v. Ebbs*, 2 Hun, 438; *Cory v. White*, 59 N. Y. 336.)

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Lewis E. Curr for respondent. No person is now disqualified as a witness because of interest, except in certain cases enumerated in the Code, and whoever asserts the existence of the disqualification must point out the way in which the exception applies. (Code of Civ. Pro., § 828, *Staples v. Fairchild*, 3 N. Y. 41; *Van Alstyne v. Erwin*, 11 id. 331, 341; *Lobdell v. Lobdell*, 36 id. 327, 333, 334.) At common law the agent was not incompetent as a witness because of interest in an action to which his principal was a party, where no question of exceeding his powers as agent was involved. (*Bailey v. Ogdens*, 3 Johns. R. 399, 420; 1 Greenlf. on Ev. [13th ed.], § 416; *Lowber v. Shaw*, 5 Mass. 241; *Rice v. Gove*, 22 Pick. 158 [33 Am. Dec.] 724, *Wainright v. Straw*, 15 Vt. 215; 40 id. 675; *Gilpin v. Howell*, 5 Penn. 41, 45 [Am. Dec.], 720, *Hoffman v. Delehanty*, 13 Abb. Pr. 388; *Lyth v. Bond*, 40 Vt. 618.) Since the change in the law in which the disqualification of interest was removed no more stringent rule is applied now than when the common law existed in its rigor. (*Hildebrant v. Crawford*, 65 N. Y. 107; *Hobart v. Hobart*, 62 id. 80, *Sherman v. Scott*, 27 Hun, 331; *Parker v. McCunn*, 2 Week. Dig. 502) The interest that will disqualify a witness under section 399 of the Code must be present, certain and vested, not uncertain, remote or contingent, and must be in the event of the action, not alone in the questions involved. It must be such that he will either gain or lose by the direct legal operation and effect of the judgment of the court disposing of the facts in dispute. (*Moore v. Oviatt*, 35 Hun, 216, 219; Greenlf. on Ev., § 390; *Steele v. Ward*, 30 Hun, 555, 557; *Miller v. Montgomery*, 78 N. Y. 283; *Hobart v. Hobart*, 62 id. 80, 83; *Riddle v. Dixon*, 2 Penn. 372; 44 Am. Dec. 207, 210, note.) At common law an indorser who had been released was a competent witness. He is equally competent under the Code, as he is not interested in the event of the action. (*Starkweather v. Mathews*, 2 Hill, 131; *Hubly v. Brown*, 16 Johns. 70.) The evidence offered by the defendant to which objection was made was as to a conversation he overheard between the deceased and Alfred Gilman,

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and as the witness took no part in it and was not referred to in the conversation, it was competent. (*Simmons v. Sisson*, 26 N. Y. 264; *Lobdell v. Lobdell*, 36 id. 327, 333; *Cary v. White*, 59 id. 336; *Simmons v. Havens*, 101 id. 427, 433; *Sanford v. Sanford*, 61 Barb. 293; *Hildebrant v. Crawford*, 6 Lans. 502; *S. C.*, 65 N. Y. 107.)

FINCH, J. Two questions of evidence are presented by this appeal. The action was brought to recover the amount claimed to be due upon two checks and two notes claimed to have been executed by the defendant through his general agent, Arthur Gilman. The latter was called as a witness on behalf of the defendant to prove payment, and his evidence, which involved personal transactions and communications with the plaintiffs' intestate, was objected to for that reason, but admitted under an exception by the defendant. The witness was not a party to the action, and his testimony prohibited by section 829 of the Code for that reason, but it is urged that he comes under its description of "a person interested in the event." It is argued that if the defense failed, the agent would be liable to his principal for a misappropriation of funds, or negligence in permitting the creditor to retain the paid securities. Assuming that a possible liability of the witness upon one or the other of these grounds might exist, it is obvious that it would find its origin in facts gaining no effect or potency from the event of the action or the judgment for the plaintiffs in which it might terminate. That judgment could not bind him directly by its own force, nor indirectly as evidence against him. It might prove to be the occasion or cause of a suit against him by his principal, but in defending that suit he would be utterly unaffected by the judgment against his principal and entirely at liberty to show a payment in fact made by him with his principal's funds and explain the failure to take up the notes and checks. The judgment against his principal would not hamper or affect him in the least. The correct rule is stated in *Hobart v. Hobart* (62 N. Y. 80), that the disqualifying interest must be

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not merely in the question involved, but, in the event of the particular action pending, such that the witness will either gain or lose by the direct legal effect and operation of the judgment, or that the record will be legal evidence for or against him in some other action. A fair example of such a case is that of a surety on an executor's bond who is bound by the surrogate's decree upon the accounting. (*Miller v. Montgomery*, 78 N. Y. 282.) But Gilman was not bound directly by the judgment, nor indirectly by it, as a matter of evidence. He was at liberty to dispute, as against himself, the facts upon which it rested. His possible interest in the question involved did not make him interested in the event of the action.

One of the notes sued was drawn to the order of Edward Freedman, and was indorsed by him. He was not a party to the action. He was offered as a witness in behalf of the maker of the note. Assuming that plaintiff's intestate derived title to the note through or from the indorser, although, if merely an accommodation indorser, as is alleged, the assumption might perhaps be challenged, yet the witness was not called or examined in behalf of the party succeeding to his title or interest but against that party. It is claimed, however, that Freedman was examined in his own behalf, and had an interest in the event of the action by reason of his position as indorser. But the fact of his indorsement merely did not make him liable on the note, and we think not even presumptively so. Until the note was duly presented and protested for non-payment and due notice given, the indorser was not liable at all. At the date of the trial the note was long past due, and Freedman charged as indorser or discharged by the omission of protest and notice. He says he received no notice. Presumptively, therefore, none was sent. If the plaintiffs had shown that his liability as indorser had arisen, or possibly even that a claim of protest and notice in good faith existed, so as to leave the question of liability open, it might be urged that he had an interest in proving payment, but until something of the kind appeared, he stood not at all in the

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attitude of one interested in the event of the action and examined in his own behalf. The general rule excludes no one on account of interest. Whoever would close the mouth of a witness must place him within the boundaries of the exception. This was not done. The court could not pronounce him disqualified upon the facts before it, for nothing appeared raising even a presumption of an interest in behalf of which his testimony could operate.

No other questions need to be considered.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
GEORGE H. OGLE, Appellant.

On the trial of an indictment for murder, where it was claimed by the prosecution that the defendant fled after the homicide, *held*, it was competent to prove the action of the officers in seeking for him to arrest him.

Upon such a trial after a witness for the defendant had testified that he (defendant) had been previously arrested on a charge of shooting a man, and honorably acquitted, the defendant was called as a witness in his own behalf, and, on cross-examination, was asked if he had been arrested on the charge referred to by his witness, and an answer was received under objection and exception. *Held*, no error.

Defendant's counsel asked the court to charge, in relation to facts necessary for the corroboration of an accomplice, "that they must be inconsistent with the innocence of the defendant, and which exclude every hypothesis but that of guilt." The court refused so to charge. *Held*, no error; that the rule only requires a corroboration as to some material fact which goes to prove the prisoner was connected with the crime.

The court, after it had left the question of the credibility of witnesses, claimed to be accomplices, to the jury, refused to charge that the jury would be justified in requiring every fact sworn to by said witnesses to be corroborated to its satisfaction, and if not so corroborated, to reject the fact as not proved. *Held*, no error.

(Argued February 8, 1887 ; decided March 1, 1887.)

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APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made June 28, 1886, which affirmed a judgment of the Court of General Sessions in and for the city and county of New York, entered upon a verdict convicting the defendant of the crime of murder in the second degree.

The facts, so far as material to the questions discussed, are stated in the opinion.

William F. Howe for appellant. It was error to allow the district attorney to prove by the police officers what they did in seeking the prisoner. (*People v. Ryan*, 79 N. Y. 301; *Coleman v. People*, 58 id. 561; *Anderson v. Rome, W. & O. R. R. Co.*, 54 id. 341; *Stokes v. People*, 53 id. 184; *Worrall v. Parmalee*, 1 id. 52.) There was error in permitting the district attorney to inquire as to a previous arrest and indictment of the defendant for shooting. (*People v. Irving*, 95 N. Y. 541; 72 id. 571; *Real v. People*, 42 id. 281; *Ryan v. People*, 79 id. 600; *Crapo v. People*, 15 Hun, 272, 290; *People v. Brown*, 72 N. Y. 571; *People v. Gay*, 7 id. 378; *Jackson v. Osborn*, 2 Wend. 555.) The reason questions as to arrest and accusations have been held incompetent proceeds upon the theory that arrests and accusations prove nothing; that the person so arrested or accused is to be presumed innocent. (*People v. Irving*, 95 N. Y. 541; *Ryan v. People*, 79 id. 600; *Crapo v. People*, 15 Hun, 272; *People v. Crapo*, 76 N. Y. 290; *People v. Brown*, 72 id. 571; *People v. Gay*, 7 id. 378; *Jackson v. Osborn*, 2 Wend. 555; *Coleman v. People*, 58 N. Y. 555; *Anderson v. Rome, W. & O. R. R. Co.*, 54 id. 341; *Stokes v. People*, 53 id. 184; *Worrall v. Parmalee*, 1 id. 52.) An accomplice, or an impeached witness, is never legally corroborated by other evidence as to immaterial matters. (*People v. Plath*, 100 N. Y. 593; *Roscoe's Crim. Ev.* 122.) Whenever corroboration is required it must be as to material facts. (*People v. Plath*, 100 N. Y. 593; *People v. Courtney*, 28 Hun, 589; *People v. Williams*, 29 id. 520; *Ormsby v. People*, 53 N. Y. 474;

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Kenyon v. People, 26 id. 207; *Brice v. People*, 55 id. 645; *Armstrong v. People*, 70 id. 38.) The witnesses, Rogers and Hopper, by their own testimony, are clearly brought within the provisions of section 30 of the Penal Code, defining who are accessories. (*People v. Lindsay*, 63 N. Y. 153; 1 Russ. on Crimes, 261; *People v. Petmecky*, 99 N. Y. 415.)

McKenzie Semple for respondent. The evidence as to the flight of the accused was admissible. (*Ryan v. People*, 79 N. Y. 601.) As was also that in regard to his having been arrested for shooting a man in front of Miner's Theatre. (*Nolan v. Brooklyn R. R. Co.*, 87 N. Y. 63.) The witnesses, Hopper and Rogers, were not accomplices of the prisoner in the commission of the offense. An accomplice is a person, who, knowingly, voluntarily and with common intent, unites with the principal offender in the commission of a crime. (Whart. Crim. Ev. § 440; Penal Code, §§ 30, 32, 33.) The court having charged that the witnesses were not accomplices, the discussion as to whether he laid down the correct rules as to the evidence requisite to the corroboration of an accomplice, is superfluous. (*People v. Ryland*, 1 N. Y. Cr. R. 123; *People v. Courtney*, id. 64; 2 id. 441; *People v. Plath*, 4 id. 53.)

PECKHAM, J. Several grounds are stated by the counsel for the prisoner for granting a new trial, but we think that not one is sufficient. It seems, on the contrary, to be quite a plain case for an affirmance of the judgment. But as the prisoner has been convicted of murder in the second degree and sentenced to imprisonment for life, we have not only given full attention to the arguments advanced by his counsel, but in deference to the gravity of the case we will briefly state the reasons for the result arrived at by us.

(1.) The first alleged error consists in permitting proof of the action of the officers in seeking for the prisoner after the crime was committed. It was offered and received upon the question of the flight of the prisoner. The court decided correctly in admitting the evidence. The crime was com-

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mitted on the 30th of November, 1882, and a brother of defendant was charged with its commission and both were arrested that night. The prisoner was present at the examination of his brother but was not called as a witness. The brother was subsequently indicted, but was finally discharged on his own recognizance as there was no proof against him, and at that time none against the prisoner. Subsequently, in January, 1884, several persons were arrested and brought down before the district attorney, or some of his officers, and statements were made by some of them which led the authorities to desire the arrest of the prisoner. The evidence objected to was then permitted to be given by the district attorney showing what the officer did in order to arrest the prisoner; that he went to his house for the purpose of looking for him, but did not find him there, and also to a saloon kept by one Ogle (but not the prisoner, nor was it his home), and did not find him, and also searched the neighborhood or vicinity without success, and also made inquiries, but without finding him until September 6, 1886, when he was arrested in New York, and he then told the officer, as the officer swore, that he had been in Montana, Kansas City and Montgomery, Alabama, and that if the officer had not got him then, he "was going away to-morrow evening," and "I guess you never would have got me."

All this evidence was perfectly proper. The district attorney claimed it proved the prisoner had run away, and from that, among other things, he might ask the jury to infer guilt. If it did not prove flight, no harm was done. All that could be said was the people had tried to prove a fact and failed; but the evidence was so plainly admissible that no argument upon it is required.

(2.) The next ground taken by counsel for the prisoner to obtain a reversal rests upon the fact that the district attorney, upon the cross-examination of the prisoner, asked him if he had been arrested for shooting a man at Miner's Theatre. The evidence was admitted under the objection and exception of the prisoner's counsel. Whatever the ruling of the court

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might otherwise have been, it is clear no right of the prisoner was illegally invaded under the facts of this case, for his counsel had already proved the same fact in the examination of the father of the prisoner, who testified his son had been arrested and honorably acquitted upon the trial of a charge for shooting a man at Miner's Theatre, showing conclusively the two examinations referred to the same transaction.

(3.) The counsel asked the court to charge the jury in relation to the facts necessary for the corroboration of an accomplice "that they must be inconsistent with the innocence of the defendant and which exclude every hypothesis but that of guilt." The court refused and counsel excepted. In this the court was clearly right. There is not and never was any such rule as to corroboration. The whole law of evidence will be searched in vain for it. The authorities cited by prisoner's counsel maintain no such rule. The rule is stated in one of them (*People v. Plath*, 100 N. Y. 590, 593), and it is wholly different from the request herein made. It only requires a corroboration as to some material fact which goes to prove the prisoner was connected with the crime. Another answer is that the witnesses, in regard to whom the request was made, were not accomplices in any sense of the word. Neither was even charged with any crime whatever. The most that could be alleged was that one of them, after the crime was committed, had the knife placed in his hand, and he threw it under a chair in the ball room, to which he immediately returned after seeing the prisoner plunge it in the deceased. There is no evidence whatever that either had the least thought that the murder was to be committed, or in any way aided or abetted in its commission. Even if the rule as to the evidence of an accomplice had been erroneously stated by the court, it was, therefore, wholly immaterial in this case.

(4.) The court was also asked to charge the jury that it would be justified in requiring every fact sworn to by the witnesses, Rogers and Hopper, to be corroborated to its satisfaction, and if not so corroborated, to reject such fact as not proved. The court left the question of the credibility of the

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witnesses under proper instructions to the jury. The charge was an eminently fair one and all the legal rights of the prisoner were therein carefully and fully guarded.

The record reveals no error and the judgment should be affirmed.

All concur.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v.
DWIGHT HAGADORN et al., Respondents.

Where an action to recover damages for the alleged unlawful taking of timber cut from land of which plaintiff has not the actual possession, is based wholly upon a constructive, possession arising out of his claim of title to the land, defendant may contest the validity of such title.

The proceedings by which the annual assessment-roll of a town is to be formed, being specially pointed out by statute, whenever the requirements are material they must be strictly pursued to validate a sale of property under the warrant.

The duty imposed upon the board of supervisors of the county requires not only that it shall establish a ratio upon which the tax is to be based, but also, that it shall compute and enter in the roll, in a column opposite the valuation of real and personal estate, the amount of tax levied thereon; this must be done under the supervision of the board, and before the roll can be certified to as completed.

The duty of passing upon the question of a corrected assessment-roll, and certifying to its accuracy and completeness as a perfected roll, is a judicial duty which cannot be delegated.

Where, therefore, it appeared that a board of supervisors fixed the ratio of tax upon the aggregate amount of valuation, and without extending the tax, signed the roll and attached the collector's warrant thereto, and delivered it to the supervisor of the town, with authority to compute and enter the amount of the tax, which he did, and then delivered the roll and warrant to the collector, *held*, that the roll and warrant were fatally defective, that a return of the non-payment of taxes so levied conferred no authority upon the State comptroller to sell land thus taxed, and that the State as a purchaser at such a sale acquired no title.

Where the comptroller has in his hands unpaid reported taxes for a number of years upon a piece of land, some of which are legal and some invalid, he may not enforce the payment of the illegal taxes by

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taking proceedings to collect the legal ones; he cannot compel the owner of the land in order to regain possession of his property to pay a sum of money which the State has no right to demand.

A sale, therefore, of the land for the taxes of several years, one or more of which is illegal and void, is an excess of jurisdiction and void.

Also *held*, where the State claimed title to lumber cut from land bid in for it, at such a sale, that proof of the comptroller's deed, having as against the State shown that it had once parted with its original property therein, and assumed to sell the land as that of a citizen for taxes, it was precluded from claiming that its original proprietorship still remained.

(Argued February 3, 1887; decided March 1, 1887.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made June 29, 1885, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial without a jury. (Reported below, 36 Hun, 610.)

This action was brought to recover the value of certain lumber manufactured from logs cut by defendants from certain lands in Fulton county, to which plaintiff claimed title under a comptroller's deed on sale of the land for unpaid taxes.

The facts, so far as material, are stated in the opinion.

Denis O'Brien, attorney-general, for appellant. The trial court erred in holding that the comptroller's deed was void because the board of supervisors of Fulton county, in the years 1868, 1869 and 1870, did not themselves perform the clerical work of inserting in the tax-roll, in each of said years, the amount of the tax levied and determined upon by them to be raised upon the taxable property of the town, but instructed the supervisor to do such work, and the same was done by him in strict accordance with their instructions before the tax-roll and warrant for the collection of the tax were delivered to the collector. (*Talmadge v. Board of Sup'rs of Rens. Co.*, 21 Barb. 611; *Coleman v. Shattuck*, 62 N. Y. 348; *S. C.*, 5 T. & C. 34; *Bradley v. Ward*, 58 id. 401; *Overing v. Foote*, 43 id. 290; *First Nat. Bk. v. Waters*, 9 Fed. 152, 158; *Heft v. Gephart*, 65 Penn. St. 510; *Hubbard v. Winsor*, 15 Mich. 146; *Powell v. Tuttle*, 3 N. Y. 396; *Commercial Bk. v. Norton*,

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1 Hill, 501; *Grinnell v. Buchanan*, 1 Daly, 538; *People v. Bk. of N. A.*, 76 N. Y. 547; *Parish v. Golden*, 35 id. 462; *Westfall v. Preston*, 49 id. 349; *Carr v. Shipman*, 6 Barb. 621; *Dows v. Village of Irvington*, 66 How. 93; *Price v. Peters*, 15 Abb. Pr. 197; *Sherman v. Trustees*, 27 Hun, 390.) The lands being wild and unoccupied, and the defendant not being in possession or connecting himself with any party claiming possession, the people of the State, in their right of sovereignty, are presumed to be the owners and to have a legal title. (*Gerard's Titles to Real Estate*, 9; *People v. Arnold*, 4 N. Y. 508; *Wendell v. Jackson*, 8 Wend. 312; *People v. Dennison*, 17 id. 312; *People v. Rector, etc., Trinity Church*, 22 N. Y. 44; *Lyon v. Sellow*, 34 Hun, 124.) The lands having been sold for the unpaid taxes of 1866 and 1867, which were concededly regular and valid, the comptroller had jurisdiction to sell, and the sale was not vitiated because taxes of other years, defectively assessed, were included. (*Parish v. Golden*, 35 N. Y. 462; *Denman v. McGuire*, 17 N. Y. Week. Dig. 504; *Sheldon v. Wright*, 5 N. Y. 497; *Skinnion v. Kelly*, 18 id. 355; *Simpson v. Burch*, 4 Hun, 315; *Wood v. Knapp*, 100 N. Y. 109.) The defendant in an action of trover cannot defeat the plaintiff's recovery by showing an outstanding title in a third person, unless he connects himself with that title. (*Kissam v. Roberts*, 6 Bosw. 154; *Duncan v. Spear*, 11 Wend. 57; *Daniels v. Brown*, id. 57; *Rogers v. Arnold*, 12 id. 30, 36; *Stowell v. Otis*, 71 N. Y. 36.)

George W. Smith for respondents. The extending of the tax by the supervisor, acting individually after the adjournment of the board, even though he was furnished with a ratio for computation, was more than a clerical act. It was the final act for fixing a tax lien on the property, which could only be legally done by the board in session, and which required the sanction of the whole board to give it authority and validity. (*Bellinger v. Gray*, 51 N. Y. 610; *Bradley v. Ward*, 58 id. 40; *Thompson v. Burhans*, 61 id. 62, 65; *Merritt v. Portchester*, 29 Hun, 619; *Johnson v. Ellwood*, 53 N. Y. 433;

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Hill v. Draper, 10 Barb. 454.) If the plaintiffs fail to show title to the land they must fail as to the logs, as they give no other proof of ownership or possession. In trespass *de bonis* or trover, the plaintiff had to show title or right of possession, though defendant showed none. (*Aiken v. Buck*, W. R. 446; *Hurd v. West*, 7 Cow. 752; *Shelden v. Soper*, 14 J. R. 352; *Hoyt v. Van Alstyne*, 15 Barb. 568; *Thompson v. Burhans*, *supra*; *Sinclair v. Jackson*, 8 Cow. 543; *Johnson v. Elwood*, 53 N. Y. 453, 454.) The defendants, though strangers to the title, may object to the want of title in the plaintiff. (*Sinclair v. Jackson*, *supra*; *Thompson v. Burhans*, *supra*; *Johnson v. Elwood*, 53 N. Y. 131; *Beekman v. Bingham*, 5 id. 366.) The plaintiff must recover, if at all, on the strength of its own title, and not by reason of any want of right in the defendants. (*Hill v. Draper*, 10 Barb. 454.)

RUGER, Ch. J. The pleadings in this case on both sides seem to be inartificially drawn, and if the proper objections had been taken it is by no means certain, that a defense could have been proved, but under the liberal rules established by the Code of Civil Procedure, and the course of the trial, we are constrained to determine the case upon the facts proved, and the issue thus apparently made and tried.

Not only the complaint but also the answer was argumentative in character. The plaintiff deducing its title to the lumber in dispute, as the result of its alleged ownership of the lands, and the defendants' claiming to have controverted the fact of such ownership, as the necessary consequence of their denials of the plaintiff's title.

The plaintiff did not claim to have had actual possession of the land, or of the lumber in dispute, but based the action wholly upon a constructive possession, arising out of its claim to be the real owner of the land. The defendants controverted this fact of possession by proof, and when possession is relied on to sustain the action, it was always competent for a defendant, in an action of trover, to show that the plaintiff did not have possession. If, however, the plaintiff had once established

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the fact of possession, it would have been incompetent for the defendant to show title in a third person without connecting himself with it. All parties assumed the sufficiency of the defendant's answer, and the trial proceeded upon the theory that the action depended upon the validity of the comptroller's deed under which the plaintiff claimed.

No material objection was raised to any of the evidence offered by the defendants, and no question made throughout the trial upon the form, sufficiency or effect of the defendants pleading.

The plaintiff claimed that the proof of the comptroller's deed established its title to the land, and that the right of possession of lumber cut thereon followed as a necessary deduction from such title, and the defendants contended that the plaintiff never had possession, or the right thereto, because the deed shown by it, had no legal validity.

The plaintiff's right of recovery having been thus made to rest exclusively upon the validity of its title, and the legal inferences to be drawn therefrom, we must examine the objections to the comptroller's deed, with a view of determining whether its title was thus established.

It was admitted on the trial that the sale under which the comptroller assumed to execute the deed in question, was based upon the non-payment and return of taxes on the land in question, for the years 1866 to 1870, both inclusive. The defendants thereupon gave evidence, without objection, tending to show that for the years 1868, 1869 and 1870, the board of supervisors for Fulton county had never computed, entered or extended upon the annual assessment-rolls, the aggregate amount of the town and county tax, levied upon any of the lands in Stratford, Fulton county, for either of the years named.

It appeared that the supervisor for that town after the final adjournment of the board of supervisors, and after they had signed and attached the collectors warrant to the uncompleted assessment-roll, carried the same home, and in the absence of the board of supervisors, computed the amount

of the tax for each of the years in question, upon the several pieces of land therein described, and entered it in the roll, and, as thus filled out, handed the roll and warrant to the collector for collection.

It was also proved that the board of supervisors before adjourning had, in each year, fixed the ratio of tax upon the aggregate amount of valuation, and had authorized the supervisor of the town to compute and enter the amount of the tax in the roll.

We are quite clear that this proceeding constituted a fatal irregularity in the proceedings to levy the taxes in question. The proceedings by which the annual assessment-roll is to be formed are specially pointed out in the statute, and whenever the requirements are material, they cannot safely be omitted by the officers charged with their performance.

It is an elementary rule that public officers, exercising the right of selling the property of the citizen, by statutory authority are required to pursue the requirements of the statute strictly. Thus the statute requires that the town assessors, shall make annual enumeration and assessment of the persons and property, liable to taxation in the several towns, and enter the same upon an assessment-roll, consisting of four columns; in the first of which shall be entered the names of taxable inhabitants; in the second, the quantity of land to be taxed to each person; in the third, the value of such land, and in the fourth the value of personal property. When the roll is sworn to by the assessors, and thus prepared for the action of another body, it is to be delivered to the supervisor, for transportation to the board of supervisors. The board of supervisors is then required, after equalizing valuations in the several assessment-rolls in the county, to prepare a fifth column upon the assessment-roll and estimate and set down therein, opposite to the several sums set down as the valuation of real and personal estate, the respective sums in dollars and cents, rejecting the fractions of a cent, to be paid as a tax thereon. (2 R. S. [7th ed.], 990-997, §§ 9, 27, 33.)

It is also required to deliver the corrected assessment-roll, or a fair copy thereof, to the collectors of the respective towns, and before doing so to annex to such roll a warrant under their respective hands and seals, commanding them to collect from the several persons named in the assessment-roll, the several sums mentioned in the last column of such roll opposite their respective names (2 R. S. § 36), and finally said board, as soon as it shall have sent or delivered to the collector such roll and warrant, is required to transmit to the county treasurer a statement containing the names of the several collectors, the amounts they are respectively to collect, and the purposes for which they are to be collected. (§ 38, p. 997.)

It is quite obvious from the chronological order in which the proceedings are directed to be taken, that the duty of computing and entering the amount of the tax upon the assessment-roll is imperative. Legal validity could not be given to a warrant requiring the collector, to collect the sums entered in the last column of the assessment-roll, when none are entered therein, nor could the board of supervisors inform the county treasurer of the aggregate amount of the tax to be collected, when it had not been ascertained.

Each of these directions requires a completed assessment-roll, and the united action of the board of supervisors while it is still in actual session, and capable of corporate and co-operative action. (*Bradley v. Ward*, 58 N Y. 401.)

The proper assessment of a tax requires not only the establishment of a ratio upon which the tax is to be based, but also the computation and entry in the roll of the amount of tax levied. Without this no tax has been levied and the board of supervisors has failed in the performance of the duty which the statute specifically enjoins upon it. Whatever clerical duty may properly be devolved upon third persons, it is clear that it can be such only as is to be performed in the presence of the board and under its supervision, and that the duty of passing upon the question of a corrected assessment-roll and certifying to its accuracy and comple-

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ness as a perfected roll, is a judicial duty which cannot be delegated. (*Bellinger v. Gray*, 51 N. Y. 610)

We are, therefore, of the opinion that the rolls for the several years 1868, 1869 and 1870 in the town of Stratford and the warrants attached thereto were fatally defective, and imposed no liability upon the persons taxed.

It is also equally clear that a return of the non-payment of taxes, so levied, conferred no authority upon the comptroller to sell the land thus taxed. (*Thompson v. Burhans*, 61 N. Y. 52; *Whitney v. Thomas*, 23 N. Y. 281.)

It is, however, claimed that the taxes for the respective years 1866 and 1867, having been lawfully imposed and there having been default made in the payment thereof, the comptroller acquired jurisdiction to sell and convey such lands, although the sale was also made, for an aggregate sum including the illegal taxes for other years. In other words, it is claimed that the comptroller, having in his hands unpaid reported taxes for a number of different years, some of which were legal and some invalid, can enforce the payment of the illegal taxes by taking proceedings to collect the legal ones, and that the owner of real estate can only regain possession of his property by paying a sum of money which the State has no legal right to demand.

We do not think such a proposition can be supported.

It appears that the sale of the land in question was made by the comptroller in 1877, and was predicated upon the aggregate of the taxes thereon, for all of the years from 1866 to 1870 inclusive, and that the same was bid in on such sale by the State at a gross sum, sufficient to cover the entire taxes.

No such sale can become perfect, so as to vest title in the purchaser until after an opportunity has been given to the owner to redeem his land and reclaim the title. (*Westbrook v. Willey*, 47 N. Y. 457; *Doughty v. Hope*, 3 Den. 594.) By the statute in force at the time of this sale, such redemption might be made at any time within two years after the last day of sale, by paying to the State treasurer for the use of the purchaser the sum mentioned in the certificate of sale, with

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ten per cent interest thereon; and it was further required that the comptroller should give notice stating specifically the parcels of land unredeemed, and the amount required to redeem the same, and publish the same for six weeks in certain designated newspapers in the county, and finish such publication at least eighteen weeks before the final period of redemption.

This notice is said to be for the benefit of the owners, and no title passes until it has been properly published and the time of redemption has expired. (*Westbrook v. Willey, supra.*)

Under our scheme of taxation, the tax for each year is separately levied and returned to the comptroller, and he is under no legal obligation in making a sale of lands, to join the taxes of different years, or to sell for the aggregate sum of all the taxes due for separate years upon such land.

The necessary effect of such a joinder of taxes is, therefore, to make the payment of an illegal tax, the condition of the owner's right to retain his property, and subject him, contrary to the meaning and spirit of the statute, to the payment of an unjust and illegal exaction, as the price of his legal right to redeem his property.

Upon the sale the purchaser is required to bid sufficient to cover all of the taxes claimed against the land, and upon redemption the owner is required to pay the same amount with interest. The sale being for an entire sum, it cannot be legal beyond the amount for which the comptroller was legally authorized to sell the land.

There can be no division of the sum payable, and no separation which can validate a part and reject the rest. It is either wholly bad or altogether good.

The invalidity of such a sale has been the subject of frequent discussion among text writers and in the cases, and the authorities seem to be quite uniform on the subject. (Burrroughs on Taxation, § 113; Cooley on Taxation, 345.)

It has been repeatedly held that a sale of land for the taxes of several years, one of which is void, is an excess of jurisdiction

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in the officer making the sale and renders his proceedings void. (*Moulton v. Blondell*, 24 Me. 283; *Wallingford v. Fishe*, id. 386; *Hardenburgh v. Kidd*, 10 Cal. 402; *Elewell v. Shaw*, 1 Greenlf. 335; *Hall v. Kelling*, 16 Mich. 135; *Santa Clara Co. v. Southern Pac. R. R. Co.*, 18 Cal. 394; *Rinde v. Howell*, 113 Ill. 250.)

Many other cases might be cited from these and other States, but sufficient have been referred to, to show that the doctrine stated has the support, not only of the federal courts, but also those of every State in the Union, except where statutory regulations interfere.

We therefore conclude that the comptroller's deed, under which the plaintiff sought to make claim to the lumber in question, was wholly void and the plaintiff's claim must fail.

The ground suggested by the appellant that the plaintiff might still recover under its title as having the original and ultimate property in all of the lands in the State, is quite untenable.

The proof of the comptroller's deed having, as against the state, shown that it had once parted with its original right of property, and assumed to sell the land as that of a citizen for taxes, precludes it from claiming that its original proprietorship still remains.

We are, therefore, of the opinion that the judgment should be affirmed.

All concur.

Judgment affirmed.

THE CUNARD STEAMSHIP COMPANY (Limited), Appellant, v.
JOHN R. VOORHIS et al., Respondents.

The provision of the Code of Civil Procedure (§ 1279), authorizing the submission of a controversy upon facts admitted, is limited to controversies which can be followed by an effectual judgment upon the submission.

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Where, therefore, the only relief the plaintiff would be entitled to on the facts agreed upon is an injunction, as that relief is expressly prohibited (§ 1281) in such a proceeding, the submission should be dismissed.

(Argued February 4, 1887; decided March 1, 1887.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made April 7, 1884, which directed judgment in favor of defendants, upon a case submitted under section 1279 of the Code of Civil Procedure.

The material facts are stated in the opinion.

George De Forest Lord for appellant. Every grant carries with it, by implication, whatever is necessary for the proper enjoyment of the thing granted. (McAdam's Landl. and Ten., 114; *Kelsey v. Durkee*, 33 Barb. 410; *Doyle v. Lord*, 64 N. Y. 432.) The right to use a slip for ferry purposes is one of those privileges of exclusive occupation which the dock department are allowed to grant. (Laws of 1871, chap. 574, § 6.) The dock department had the power originally to grant the privilege. All the powers possessed by that department are contained in chapter 137 of Laws of 1870, section 99 as amended by chapter 534 of Laws of 1871, section 6. (Chap. 80, Laws of 1798; Valentine's Laws of City of N. Y. [ed. 1862] 1285-1289, 1295, 1301, 1309; 2 Laws of 1871, 1236, 1237.) In no event should the dock department interfere with the plaintiff's use of this shed; such obstructions, if they are obstructions, are placed under the special charge of the commissioners of pilots. (Laws of 1857, chap. 671 § 8, as amended by the act of 1858, chap. 226, § 5; Laws of 1882, chap. 410, § 777; *Com'rs of Pilots v. Clark*, 33 N. Y. 251; *Com'rs of Pilots v. Erie R. Co.*, 5 Robt. 366.)

David J. Dean for respondents. The department of docks has no power to establish ferries. (*Mayor, etc., v. S. I. Ferry Co.* 42 How. 254.) The resolution of June 21, 1876, is at most a mere license or permission and is not assignable, and has been revoked. (*Jamison v. Millemann*, 3 Duer, 255; *Babcock v.*

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Utter, 1 Keyes, 115; *Dexter v. Hazen*, 10 John. 246; *Jackson v. Babcock*, 4 id. 418.) The resolution of June 21, 1876, if it is construed as giving a right to the Central Railroad Company to occupy the bulkhead, for ferry purposes, is void, because the dock department has no power to establish a ferry. (*Mayor, etc., v. N. Y. & S. I. Ferry Co.*, 8 J. & S. 232, 244, 245, 247; *Conway v. Taylor's Est.*, 1 Black. 603.) The dock department had no right to place any structure outside of the new bulk-head, and their action in so placing the shed was illegal and, therefore, conveyed no rights. (Laws of 1871, chap. 574 of Laws of 1871.) This shed being erected contrary to the provisions of the law fixing a bulk-head line, could not be authorized by the city authorities and is a nuisance—a *purpresture*. (*People v. Vanderbilt*, 26 N. Y. 287.) The passing of the resolutions of April 26, 1876, and June 21, 1876, by the dock department was an excess of power, and such resolutions are consequently void. (Laws of 1871, chap. 571; *Taylor v. Beebe*, 3 Robt. 262; *Brady v. Mayor, etc.*, 2 Bostwick, 173; 20 N. Y. 312; *McDonald v. Mayor, etc.*, 68 id. 23; *Hodges v. Buffalo*, 2 Den. 112; *Donovan v. Mayor, etc.*, 33 N. Y. 291.) The commissioners of docks are empowered by statutes to remove unlawful structures which obstruct the slips, piers and bulk-heads, and consequently to direct the removal of the structure in question. (Laws of 1871, § 711, Consolidated Act.)

ANDREWS, J. The judgment from which this appeal is taken was rendered by the General Term, upon an agreed statement of facts, presented for the purpose of procuring the judgment of the court upon the right claimed by the Cunard Steamship Company to maintain a shed used by the company, built upon piles in front of the bulk head adjacent to pier 40, North river, in the city of New York, which alleged right was denied by the defendants.

The steamship company, when this proceeding was instituted, was in possession of the shed and claimed the right to maintain and use the structure in connection with its business,

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as grantee of the Central Railroad Company of New Jersey, of rights acquired by the latter company under certain resolutions of the department of docks, and also as lessee from the dock department of the northerly side of said pier No. 40, for a term expiring May 1, 1889. The facts bearing upon the controversy are set forth in the submission, and it further appears that on February 24, 1882, the board of the department of docks passed a resolution directing the steamship company to remove the shed within thirty days from that date, and in default of doing so directing the engineer of the department to proceed to remove the same. It is stated in the submission that the steamship company asks for an injunction restraining the department of docks from interfering with the company's maintenance and use of the shed, and two questions are formulated for the decision of the court; "1st. Have the said Cunard Steamship Company the right to maintain and use the shed during the period for which said injunction is asked for? 2d. Should the injunction asked for be granted?"

We are of opinion that the court below, upon the case presented, had no jurisdiction to decide the controversy, or render judgment on the merits.

Section 1279 of the Code authorizes the parties to a question in difference, which might be the subject of an action, to agree upon a case containing a statement of the facts upon which the controversy depends, and present the same to the court. Section 1280 assimilates the proceeding to an action. But no relief by injunction can be granted in such a proceeding. This is expressly prohibited by section 1281, and a subsequent clause in that section declares that "if the statement of facts contained in the case is not sufficient to entitle the court to render judgment, an order must be made dismissing the submission." It is, at least, doubtful whether upon the facts stated an equitable action in the ordinary form could be maintained for an injunction. But the statute is a bar to an injunction in this proceeding, and no other relief in the nature of the

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case is obtainable at this stage of the controversy. There has as yet been no interference with the plaintiff's structure. The right of the company to maintain it is denied, and the defendants threaten to remove it. This at most can give a right to an injunction in an ordinary action, and that relief, as we have said, the court in this proceeding has no jurisdiction to grant. It comes, then, to this: The parties present to the court for decision a question which if decided for the plaintiff could be followed by no relief, and if for the defendant, would not be *res judicata* in any subsequent litigation. The first clause in section 1279, is necessarily limited to controversies which can be followed by an effectual judgment on the submission. It is clear, we think, that the court below should have dismissed the proceeding.

The judgment should, therefore, be reversed and the proceeding dismissed for want of jurisdiction.

All concur.

Judgment accordingly.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
JAMES MEEGAN, Appellant.

Where, upon the trial of an indictment for burglary, the "breaking," which is the essential element of that crime, was established by uncontradicted evidence. *Held*, that it was not error for the court to refuse to charge the jury that they might convict of misdemeanor, under the provision of the Penal Code (§ 505), declaring a person guilty of a misdemeanor who enters a building under circumstances, or in a manner not amounting to a burglary, for the purpose of committing a felony, larceny, or any malicious mischief.

Also *held*, such a refusal to charge was not error, where a modification of the indictment by striking out the characteristics of burglary would not have left an adequate description of the misdemeanor,

(Submitted February 4, 1887, decided March 1, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order

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made May 10, 1886, which affirmed a judgment of the Court of Sessions in and for the county of Queens, entered upon a verdict convicting defendant of the crime of burglary in the first degree.

The facts, so far as material, are stated in the opinion.

Benj. W. Downing for appellant.

Thomas F. McGowan, district attorney, for respondent. The offense proven was burglary in the first degree. (Penal Code, § 496.) The omission of defendant's name in the indictment is immaterial, he is named before and after such omission, and is sufficiently named. (Code of Crim. Pro., §§ 284, 285, 764.)

FINCH, J. The prisoner was indicted for burglary in the first degree. The evidence showed that with two or three confederates he broke into an inhabited dwelling-house and held, or aided in holding, one of the inmates while one of his companions attempted to commit a rape upon a female therein residing. The defendant himself testified, admitting his presence in the house and practically denying nothing. The trial court was asked to charge the jury that they might convict the prisoner of a misdemeanor, under section 505 of the Penal Code. The request was refused and an exception was taken. The jury found the defendant guilty of burglary in the first degree. The learned trial judge read to the jury the definitions of burglary in each of its three degrees, after having told them that if they doubted as to the greater offense they might convict as to the lesser. He called their attention then to the provisions of section 505, adding "I have now called your attention to all the provisions of the statute which relate to the offense charged in the indictment, and to the particular degrees of that offense." It would seem from his language that he treated section 505 as a lesser degree of the offense charged, and gave to the prisoner the benefit of the doctrine which his counsel invoked. But if his subsequent refusal to charge imports the contrary he com-

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mitted no error. Nothing in the facts proved warranted a conviction for the misdemeanor. The proof, without contradiction, established all of the elements of burglary in the first degree. There was no room for any possible conclusion upon the evidence that any opening to the house was unclosed or that the entrance was effected without a "breaking." The defendant makes no such pretense. He only says that he was in such a state of intoxication that he did not know how entrance to the house was effected. The "breaking," which constitutes the essential element of the crime of burglary, stood, therefore, in the case an uncontradicted fact, and since, under section 505, the lesser offense of a misdemeanor could only exist where the entry into the building was "under circumstances, or in a manner not amounting to a burglary," the trial court was certainly authorized to decline a charge to the jury that they might convict of a misdemeanor. That would have been to tell them that they might disregard clear and definite testimony, not only unimpeached but entirely without contradiction. It may be added, also, that no modification of the indictment, by striking out the characteristics of burglary in any or all of its degrees, would have left an adequate description of the misdemeanor. That offense involves an intent to commit a felony, or a larceny, or malicious mischief, accompanying the entry. The only allegation of intent in the indictment is "to commit some crime." (Code Crim. Pro., §§ 444, 445; *Dedieu v. People*, 22 N. Y. 178.) It is clear, therefore, that the exception was unfounded.

No other questions require discussion.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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THE ERIE COUNTY SAVINGS BANK, Respondent, v. CAROLINE
E. COIT, Executrix, etc., Respondent.

Where a contract of guaranty is entered into concurrently with the principal obligation, a consideration which supports the latter supports the former; and the consideration need not be expressed in the guaranty, but may be shown by parol.

Plaintiff held a bond and guaranty, delivered to it by the First National Bank, to secure deposits, which the latter undertook to repay with five per cent. interest. At the request of plaintiff said bank executed to it a new bond which recited that it was executed in consideration of deposits made, or that might be made, which the obligor undertook to repay on demand, with interest at four per cent. On the bond was indorsed a guaranty, the consideration expressed therein being the making of the deposits mentioned in the bond. Four days after the receipt of the new bond and guaranty the others were surrendered. No deposits were made after the delivery of the new bond and guaranty, and the bank failed about a month thereafter. In an action upon the guaranty, *held*, it was a legitimate inference from the circumstances that the new bond was intended by the parties as a substitute for the original one, and the surrender of the latter was a good consideration for the guaranty; also, that it was immaterial whether the guarantors knew or did not know that the surrender of the old bond was in the contemplation of the parties when they became guarantors.

Under the general act regulating the dealings and operations of savings banks (§§ 27, 28, chap. 371, Laws of 1875), the fact that a savings bank secures an agreement to pay interest from the bank with which it makes a deposit authorized by said act, does not convert the deposit into an unauthorized loan.

(Argued February 7, 1887; decided March 1, 1887.)

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, entered upon an order made June 8, 1885, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

This action was brought upon a guaranty executed by the original defendants indorsed upon a bond executed by the First National Bank of Buffalo.

The substance of the bond and guaranty and the material facts are stated in the opinion.

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Daniel L. Lockwood for appellant. The defendants are not liable upon the contract of guaranty which is the subject of this action. Its execution, etc., by them being without any consideration. (*McLaren v. Watson*, 26 Wend. 435; *Westhead v. Sprosen*, 6 H. & N. 728; 23 Moak's Eng. Rep. 477; *Parker v. Bradley*, 2 Hill, 584; *Vanderbilt v. Schreyer*, 91 N. Y. 399; *Pratt v. Hedden*, 121 Mass. 116; *Elliss v. Clark*, 110 id. 389; Brant on Suretyship, § 32; 11 Md. 322; De Colyar by Morgan, 179; *Halliday v. Hart*, 30 N. Y. 474.) A valid agreement to forbear the collection of a debt may furnish a good consideration, but forbearance only cannot. (*Manter v. Churchill*, 127 Mass. 31; *Sharpe v. Galbraith*, 32 Penn. St. 10; *Mecorne v. Stanley*, 8 Cush. 85; *Wood v. Turnicliff*, 74 N. Y. 38; *Hopkins v. Logan*, 5 M. & W. 247.) The plaintiff had no authority to take the guaranty of defendants to secure the payment of money, deposited in the First National Bank. (2 R. S. [7th ed.] 1429; *Beatty v. Marine Ins. Co.*, 2 J. R. 108; *McCullough v. Moss*, 5 Den. 567; Ang. & Ames on Corp. 278, 279; 2 Kent Com. 177; 5 Wend. 547, 650; 15 J. R. 358; 12 Wheat. 64; 19 N. Y. 163; *People v. Mech. & Trad. Sav. Inst.*, 92 N. Y. 9; 21 id. 490; 14 id. 189; 15 id. 9, 98; 25 W. 650.) The inferences and conclusions to be drawn from all the testimony of the witnesses were for the jury to find and not the court. (*Rosenbach v. M. & B. Bk.*, 69 N. Y. 358; *Payne v. Gardiner*, 29 id. 146; *Boos v. World Mut. Ins. Co.*, 4 Hun, 133; 64 N. Y. 236; *Stokes v. Johnson*, 57 id. 678; *Ellwood v. W. U. Tel. Co.*, 45 id. 549; *Bidwell v. Lamsett*, 7 H. P. 357; *Keller v. N. Y. C. R. R. Co.*, 24 N. Y. 172; *Wolfkil v. Sixth Ave. R. R. Co.*, 38 id. 49; *Smith v. Tiffany*, 36 Barb. 23; 34 N. Y. 548; 35 id. 9; *Merritt v. Lion*, 3 Barb. 110.)

E. C. Sprague for respondent. The defendants having guarantied "the performance of the foregoing contract by the First National Bank," are estopped from denying its execution by the bank after the plaintiff has acted upon faith of and under it. (Brandt on Suretyship and Guarantyship,

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§ 31; *Hoboken v. Harrison*, 1 Vroom. [N. J.] 73; *Otto v. Jackson*, 35 Ill. 349.) If it was proper to make the deposits it could not have been unlawful for the Savings Bank to protect itself and its depositors by procuring security for their repayment with interest. (*Upton v. N. Y. & E. Bk.*, 13 Hun, 269; *In re Patterson*, 18 id. 221.) The defendants are estopped from claiming that the bond is invalid, and that the corporation or its officers had no power to execute it; *Brandt on Suretyship*, §§ 31, 104; *Remsen v. Graves*, 41 N. Y. 471.) Aside from the question of estoppel, the contract is one proper and lawful for the plaintiff to make, and the defendants are bound by it. (*In re Patterson*, 18 Hun, 223; *Childs v. Barnum*, 11 Barb. 14; *Brandt on Suretyship*, § 359.) The contract was made at the same time, and written on the same paper as the contract which it guaranties. It is a part of that contract, and the consideration for the bond is a sufficient consideration for the guaranty. (*Jones v. Frost*, 6 Cal. 102; *Simons v. Steele*, 36 N. H. 73; *Williams v. Marshall*, 42 Barb. 524; *Lippincott v. Ashfield*, 4 Sandf. 611; *Leonard v. Vredenburg*, 8 Johns. 29; *Bailey v. Freeman*, 11 id. 221.) The consideration need not be expressed in the guaranty, but may be shown by parol. (*Evansville Nat. Bk. v. Kaufmann*, 93 N. Y. 273; *Brandt on Suretyship*, §§ 6, 7; *Jackson v. Jackson*, 7 Ala. 791; *Wells v. Mann*, 45 N. Y. 327; *Gardner v. King*, 2 Ire. [N. C.] 297; *Jolley v. Walker*, 26 Ala. 690; *King v. Despard*, 5 Wend. 277; *Chitty on Cont.* [11th Am. ed.] 33, 35-40.) The expectations of the First National Bank, that the existing deposits would be continued and new ones would be made, furnish sufficient consideration for the execution of the bond and of the guaranty irrespective of whether or not such expectations were realized. (*Smedes v. Utica Bk.*, 20 Johns. 372; 3 Cowen, 662, 683; *Allen v. Merch. Bk.*, 22 Wend. 215, 228; *Morgan v. Smith*, 70 N. Y. 537; *Union Turnpike Co. v. Jenkins*, 1 Caines, 389; *Exchange Bk. v. Bank*, 12 Wall. 276-288; *McNaught v. McClaughry*, 42 N. Y. 22; *Mech. & Farm. Bk. v. Wickson*, id. 438.)

Opinion of the Court, per ANDREWS, J.

ANDREWS, J. The questions involved in this case have been carefully considered in the opinions pronounced at the General Term, and we shall content ourselves with a brief statement of our conclusions on the main propositions upon which the appellants rely for a reversal of the judgment.

First. It is insisted that there was no consideration to uphold the contract of guaranty. The bond and guaranty were executed concurrently. The principal obligation recites that it was executed by the First National Bank of Buffalo in consideration of deposits made, or which might be made with said bank by the plaintiff, the Erie County Savings Bank, and the recital is followed by an undertaking on the part of the obligor to repay to the savings bank on demand all deposits which it has made or may make with the First National Bank on call as required, with interest at four per cent per annum. The bond is executed under the seal of the First National Bank by its president and cashier. The undertaking of the guarantors, which is indorsed on the bond, is as follows: "In consideration of the making of the deposits, mentioned in the foregoing agreement, we each and severally guaranty the performance of the foregoing contract by the First National Bank of Buffalo." The bond and guaranty were delivered by the First National Bank to the savings bank on the 8th day of March, 1882, in compliance with a request theretofore made by the treasurer of the savings bank to the president of the First National Bank to furnish a new bond, with sureties, to secure deposits of moneys of the savings bank in the First National Bank. There had been a previous bond and guaranty of similar character executed in 1865 to secure deposits, with interest at the rate of five per cent, and from the time of giving that bond to January 17, 1882, the date of the last deposit, deposits were made in each year by the plaintiff with the obligor, payable on call. Prior to January, 1882, three of the four guarantors on the bond of 1865 had died. In consequence of this fact, in January, 1882, the finance committee of the plaintiff directed its treasurer to obtain a new bond from the

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First National Bank, as a substitute for the old one, and the request for a new bond was made in consequence of this direction. Within three or four days afterward the bond and guaranty now in question were delivered to the plaintiff, and the old bond was surrendered to the First National Bank. The latter bank failed April 14, 1882, owing the plaintiff the sum of \$30,000 for deposits on and prior to January 17, 1882. This indebtedness has been paid in part by the receiver of the insolvent corporation and in part by co-sureties of the defendant's intestate, but leaving a part of the debt still unpaid.

Upon these facts we are of opinion that the surrender of the bond of 1865 was a good consideration for the guaranty. It is a legitimate inference from the circumstances that the new bond was intended by both banks as a substitute for the original bond, and no other inference is consistent with the acts of the parties and the circumstances. That this was the intention of the plaintiff is plain from the action of its officers. The finance committee directed its treasurer to procure a new bond as a substitute for the former one, and it surrendered the old bond within a few days after receiving the new one. There was no formal action by the First National Bank, showing its intention, beyond the giving of the new bond. But the new bond covered past as well as prospective deposits, and fixed a rate of interest more favorable to the First National Bank than the former one. The president of the First National Bank testified that the rate of interest was referred to in the conversation between the treasurer of the plaintiff and himself before the new bond was given, and that the treasurer of the plaintiff, in connection with this subject, said "it would be a good thing to have a new contract made." It was in the interest of the First National Bank that the new bond should be substituted for the old one, and we cannot doubt, upon the evidence, that it was made and accepted as a substitute for the original one, and that the surrender of the old bond was in conformity with the intention of both banks when the new bond was

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given. It is needless to cite authorities to show that the surrender of an existing security is a good consideration for a new undertaking between the parties to the surrendered obligation. There being a good consideration for the bond between the obligor and obligee, it follows, we think, that the same consideration supports the guaranty, and that it is immaterial whether the guarantors knew or did not know that the surrender of the old bond was in the contemplation of the parties when they became guarantors. Where a contract of guaranty is entered into concurrently with the principal obligation, a consideration which supports the principal contract supports the subsidiary one also. We understand this to be the settled doctrine. (*McNaught v. McCloughry*, 42 N. Y. 22; *Simons v. Steele*, 36 N. H. 73; Brandt on Suretyship, §§ 6, 7.) And the consideration need not be expressed in the guaranty, but may be shown by parol. (*Evansville Nat. Bank v. Kaufmann*, 93 N. Y. 273.)

The claim that the question of consideration should have been submitted to the jury is not well taken. There was no substantial controversy in respect to the facts. The president of the First National Bank does not deny that he knew that the plaintiff held a bond to secure deposits when the new bond was given. His denial only goes to the point that he was ignorant of the precise form of the security.

Second. The other principal question relates to the validity of the agreement evidenced by the bond. It is claimed that the arrangement between the savings bank and the First National Bank was, in substance, an agreement by the former to loan money to the latter, contrary to the statute prescribing the securities in which investments by savings banks may be made. We think it is a conclusive answer to this objection that the general act regulating the dealings and operations of savings banks (Laws of 1875, chap. 371, §§ 27, 28), expressly authorizes savings banks to keep ten per cent of their deposits on deposit in any incorporated bank in this State, and that it does not appear that the deposits made with the First National

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Bank of Buffalo were in excess of this limit. The fact that the savings bank secured from the First National Bank an agreement to pay interest on the deposit does not convert the deposit into an unauthorized loan. It would seem strange to make an act of provident administration a cause of forfeiture upon a strained construction of the transaction. The deposits were, at all times, subject to call by the plaintiff. There are some subordinate questions treated in the prevailing opinion below.

We think there is no error disclosed in the record and the judgment should, therefore, be affirmed.

All concur.

Judgment affirmed.

104	538
158	251

ENOS LEE, as Surviving Executor, etc., Respondent, v. AMY HORTON, as Administratrix, etc., Appellant.

H., defendant's intestate, executed to the executors of S. two written instruments, by each of which he promised to pay to them as such executors at his death, if he died without heirs, a sum specified, which the instrument described as a fund held by the executors in trust, in which H. had a life estate, with remainder over to his heirs. H. died leaving an heir. In an action to recover the sum specified, *held*, that, as the condition in the instrument, if carried out, would cause the fund to fall into the estate of H., subject to administration, it would result in an unlawful disposition of the money, and so it was illegal and void; that the money was repayable on the death of H., irrespective of the question whether he left heirs or not; and that plaintiff was entitled to recover. Also, that as the cause of action did not accrue until after the death of H., the statute of limitations did not begin to run until then and, as the action was brought within the time limited after such death, it was not barred.

(Submitted February 7, 1887; decided March 1, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 10, 1885, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

Statement of case.

The nature of the action and the material facts are stated in the opinion.

Clifford A. H. Bartlett for appellant. The notes are void on their face. (Story on Promissory Notes, §§ 22, 23; Chitty on Bills, ch. III, 37.) The court having jurisdiction of the cause of action, it was only after it had reformed the notes that it could acquire the right incidentally to give relief in damages. (*McDougall v. Cooper*, 31 N. Y. 499; *Wells v. Yates*, 44 id. 531; *Maher v. Hibernia Ins. Co.*, 67 id. 293; *Bidwell v. Astor Mut. Ins. Co.*, 16 id. 263, 267; *Rathbone v. Warren*, 40 Johns. 596; 2 Story's Eq. Jur. § 794; *Clute v. Knies*, 102 N. Y. 382, 383; *Carpenter v. Osborn*, id. 561, 562.) To justify the court in changing the language of the instrument sought to be reformed (except in case of fraud), it must be established that both parties agreed to something different from what is expressed in the writing, and the proof upon this point should be so clear and convincing as to leave no room for doubt. (*Mead v. Westchester Fire Ins. Co.*, 64 N. Y. 455.) Plaintiff's laches is a bar to his claim to have the notes reformed. (*Smeadberg v. More*, 26 Wend. 247; *Hazul v. Dunham*, 1 Hall, 658; *Bowen v. Hone*, 2 Barb, 595; *Taylor v. Fleet*, 4 id. 103; *Munn v. Worrall*, 16 id. 232; *Voorhees v. Seymour*, 26 id. 582, 583; *Greenfield v. Mumford*, 19 Abb. Pr. 476; *Toole v. Cook*, 16 How. Pr. 144; *Thomas v. Barton*, 48 N. Y. 200; 2 Story's Eq. Jur. 734.) The cause of action is barred by the statute of limitations. (*Spoor v. Wells*, 3 Barb. Ch. 203; *Elwood v. Dieffenдорff*, 5 Barb. 411; *Cramer v. Benton*, 60 id. 226.) If this is an action at law, as held by the Special and General Terms, to recover the money loaned, then defendant was legally entitled to have the issue tried by a jury. (*Bradley v. Aldrich*, 40 N. Y. 511.) The judgment upon the notes was not consistent with the case made by the complaint. In this case the complaint states but one cause of action, and that one in equity. A suit upon the notes would have been an action at law. (*Kelly v. Downing*, 42 N. Y. 78; *Bradley v.*

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Aldrich, 40 id. 510; *Mann v. Fairchild*, 2 Keyes, 111; *Wisner v. Ocumpaugh*, 71 N. Y. 117.) The complaint did not allege, nor did the plaintiff prove, a demand for the reformation of the notes before bringing the action. (*Sharkey v. Mansfield*, 90 N. Y. 229.)

Calvin Frost for respondent. A verbal agreement by the borrower, to pay money loaned to him, at his death is not void under the statute of frauds, which requires an agreement, not to be performed within a year, to be in writing and signed by the party to be charged therewith. (2 R. S. 135 [4th ed.] 317; *Moore v. Fox*, 10 Johns. 244; *McLees v. Hale*, 10 Wend. 426; *Blake v. Cole*, 22 Pick. 97; *Lockwood v. Barnes*, 2 Hill, 128.)

RUGER, Ch. J. This action was brought against the administrator of the estate of William J. Horton, to recover money claimed to be due, under circumstances related in two written instruments reading substantially alike except as to amount, and being as follows:

“\$303.30.

PEEKSKILL, Oct. 1, 1867.

At my death, if I die without heirs, I promise to pay to Enos Lee and Ebenezer Strang, as executors of the estate of Ebenezer Strang, deceased, \$303.30, which is the amount of my share on the final distribution of the said estate, and of which I was to have the use during my life, and at my death to go to my heirs, if any, by said will. For value received.

WILLIAM JAMES HORTON.”

Horton died intestate in 1881, leaving an only child his heir-at-law, and the plaintiffs demanded repayment of the moneys loaned of his administrator. The complaint also sought to reform the agreement by striking out these words, “if I die without heirs,” upon the ground that the same were erroneously and unintentionally inserted therein by a mutual mistake of the parties thereto.

The appellant insisted that there was no evidence of any

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mutual mistake, and that the event had occurred, which, by the terms of the contract, precluded the plaintiffs from recovering the amount of the note.

We think it quite immaterial whether the instrument is called a promissory note or a contract, inasmuch as the paper is set out in the complaint *in haec verba*, and imports an agreement to pay a certain sum of money, at the death of the maker, upon the condition that he died without heirs.

Whatever the character of the instrument may be, it does not affect the right of the plaintiffs to recover in this action, provided the facts alleged and proved, in the case entitle them in any view, to reclaim the money represented by the note

The legal effect of the condition inserted in this contract is, if it is held to be a valid condition, to cause the amount of the note to fall into the estate of Horton, and be subject to administration by his legal representatives.

It is quite obvious that this would result in an unlawful disposition of the money, and that result, must have been known to the parties to the contract at the time of its execution.

Parties are always chargeable with knowledge of the law, and they must, therefore, have known that the plaintiffs held these moneys in trust, and were incompetent to dispose of them, even by the most express agreement, in a manner contrary to the purposes of the trust. (*Wetmore v. Porter*, 92 N. Y. 76.)

Any agreement, therefore, by the executors to alienate the trust funds would be illegal, not because it would be immoral or contrary to public policy, but simply because they were wholly unauthorized to make it.

It is apparent on the face of the paper that this money was repayable to the plaintiffs, upon the death of the defendant's intestate, irrespective of the question whether he left heirs or not.

The note describes the money as being a fund held by the plaintiffs in trust, in which Horton had a life estate, with remainder over to Horton's heirs. Upon Horton's death the duty of paying this sum to the remaindermen devolved upon

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the plaintiffs, and they could not, by virtue of any contract between themselves and Horton, become discharged from its performance. Neither could Horton acquire any title to such moneys by agreement with the plaintiffs.

All of the parties dealt with the fund knowing it to be the subject of a trust and incapable of alienation, and that its trust character followed it into the hands of any person receiving it with knowledge of the facts.

The executors had authority, upon receiving satisfactory security for its return, to deliver possession of the money to the life tenant for the duration of his life, and so far the contract was valid; but this was the extent of their power over it, and this plainly appears from the face of the contract.

The condition inserted that the money was not to be repaid in the event of the life tenant leaving issue him surviving was clearly illegal, and in law impossible of performance, and could not be set up as a defense against an action by the executors to recover possession of the trust fund. (*Wetmore v. Porter, supra.*)

The complaint sets out and the proof establishes all of the circumstances attending the loan of money, and it is clear upon the whole case that the plaintiffs were entitled to recover. No question arises over a misjoinder of actions, or as to the mode of trial, for the record discloses no objection upon these subjects.

Whether the action be regarded as one to recover money loaned, or to reclaim money illegally disposed of by executors, or upon the contract, disregarding, as the plaintiffs had the right to do, the manifest illegal condition attached to the provision for repayment, the plaintiffs were entitled to judgment.

In either view, the cause of action did not accrue until after the death of defendant's intestate, and the statute of limitations constituted no bar to its maintenance.

The judgment should be affirmed, with costs.

All concur, EARL, J., in result.

Judgment affirmed.

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ELECTUS B. LITCHFIELD, Executor, etc., Appellant v. CHARLES
R. FLINT, Respondent.

104	543
158	178
104	543
j172	1857
j172	857

Where a complaint shows a cause of action in favor of the plaintiff, not in a representative but in his individual capacity, the addition of the words "executor," etc., in the title, and a statement in the complaint, that he is executor of the will of a deceased person named, do not prevent a recovery by him individually; the descriptive words may be rejected.

So, also, words added to the name of the payee in a promissory note, showing that he is executor are mere *descriptio personæ*, and an action may be maintained thereon by the payee in his individual capacity.

Plaintiff's complaint alleged his appointment as executor of the will of H., the execution to him by the K. C. C. R. Co. of a promissory note, a copy of which was set forth in the complaint, which was made payable to him or order, he being described as executor of H.; the transfer and delivery of the note to F., who held the same at the time of the making of an agreement between plaintiff and defendant; in pursuance of which agreement plaintiff transferred and assigned to defendant certain stock and bonds of the company and claims against it. In consideration whereof defendant, by the said agreement, promised, among other things, that when his interest in the road and in the securities was closed up he would apply the proceeds, with the consent of the company, to the payment of the note, provided F. would relinquish certain bonds of the company. The complaint further alleged that said agreement was entered into by plaintiff individually, for the purpose of making certain provision for the payment of the note; that the note and the bonds referred to were thereafter assigned to him by F.; that when the note became due payment was demanded and refused, it was duly protested and notice of nonpayment served upon plaintiff; that the interest specified in the agreement had been closed up, and defendant had received on account of the property, over and above all advances and expenditures, a sum more than sufficient to pay said note; that the consent of the company to such payment had been obtained, and that a tender of the bonds was made, with demand of payment, but that defendant refused to pay. On demurrer to the complaint; *held*, that it set forth a good cause of action; that if plaintiff simply occupied the position of assignee from F., the promise of defendant became available to, and could have been enforced by F., and by the transfer of the note to plaintiff he acquired that right; that even if this were not so, plaintiff, having become possessed of the note, could enforce the promise to pay it, not simply as assignee of F., but as a party to the agreement.

(Submitted February 7, 1887; decided March 1, 1887.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made September 22, 1884, which reversed a judgment in favor of plaintiff, entered upon an order overruling a demurrer to plaintiff's complaint, and which sustained the demurrer and directed judgment thereon.

THE complaint in this action alleges, in substance, that on or about the 27th day of May, 1873, H. Maria Litchfield departed this life in the county of Kings, leaving a last will and testament wherein the plaintiff was nominated executor; that thereafter, on the 15th day of October, 1873, the will was admitted to probate by the surrogate of that county, and letters testamentary were duly issued to the plaintiff as such executor on the 2d day of June, 1875; that on the 20th day of April, 1878, the Kings County Central Railroad Company made and executed its promissory note in writing as follows:

"\$6,000.

Six months from date, for value received, The Kings County Central Railroad Company promise to pay E. B. Litchfield, executor of the estate of H. Maria Litchfield, deceased, or order, \$6,000 and interest, payable at the American Exchange National Bank, New York.

[Seal.] "KINGS COUNTY CENTRAL RAILROAD CO.,

"Per E. B. LITCHFIELD, *President*.

"BROOKLYN, *April* 30, 1878."

That before the maturity of the note it was transferred and delivered for full value to one Frederick W. Foote, and that there was delivered to him at the same time twelve bonds of the railroad company as collateral security for the payment thereof; that Foote was the legal holder and owner of the note and bonds on the 24th day of September, 1878, and on that day the note constituted a debt of the railroad company to him; that on that day a written agreement was executed between the plaintiff of the first part and the defendant of the second part, wherein it was recited, among other

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things, that the party of the first part was chiefly the promoter of the railroad known as the Kings County Central Railroad; that he and the railroad company were financially embarrassed, and that he was incapable of further active exertions to resuscitate the railroad company or to manage the road so as to produce from it any profit or benefit; that the party of the second part was willing to examine into the affairs of the railroad company with a view of determining what could be profitably done with the road, and if found feasible, to make the attempt to produce some profit to the party of the first part from his interest therein; that the party of the first part placed in the hands of the party of the second part certain stock of the railroad company, and transferred to him the interest of the party of the first part in certain bonds of the road, preliminary to the agreement, upon which the party of the second part made certain advances in money to the railroad company, and for which the party of the second part had and retained a claim against the railroad company; and wherein it was agreed that the party of the first part did absolutely sell and assign to the party of the second part his interest in the bonds mentioned, and that he would assign to any person the party of the second part might designate, on demand, the stock mentioned, and that he did thereby sell and assign to the party of the second part all his right, title and interest and claims and demands, other than stock and bonds, in, to and upon the railroad company; and wherein, in consideration thereof, the party of the second part agreed to pay in cash to the party of the first part the sum of \$1,750, and further agreed that when his interest in the road, or in any road or roads he might choose to build in connection therewith, and in the securities of the Kings County Central Railroad Company, and of such other road or roads was closed up, he would apply the proceeds as follows: Among other things, that he would pay, with the consent of the railroad company, the debt of the company owing to F. W. Foote, "for which he holds as collateral twelve bonds of the said the Kings County Central Railroad Company, provided said Foote

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will relinquish to him his title in four other bonds of said company now held by him, the said bonds to belong thereupon to said party of the second part, the said sixteen bonds to be at a price not to exceed the sum of six thousand two hundred dollars (\$6,200), and the said reimbursement shall include the two foregoing items." The complaint further alleges that this agreement was entered into by the plaintiff, individually, with the defendant, with the intention and purpose, among other things, of making certain provision for the payment of the promissory note mentioned, and the indebtedness of the Kings County Central Railroad Company evidenced thereby, and of indemnifying the plaintiff, as executor, from liability thereon; that the plaintiff has fully carried out and performed all the terms and conditions of the agreement on his part to be carried out and performed; that after the execution of the agreement the note above mentioned for value was transferred to and came into the possession of the plaintiff, together with the twelve bonds of the "Kings County Central Railroad Company, so as aforesaid held by said Foote, and collateral security for the payment thereof, and at the same time the said Foote delivered to this plaintiff four other bonds of the said The Kings County Central Railroad Company then held by him and relinquished and transferred to this plaintiff his title in all of said bonds," that thereafter, and on the second day of "November, 1878, the day said note by the terms thereof became due and payable, said note was presented at the American Exchange Bank for payment and payment thereof demanded and refused. Whereupon said note was duly protested in manner and form required by law, and notice of the non-payment thereof was duly served upon this plaintiff." The complaint further alleges that the enterprise and adventure in the agreement mentioned had been closed up and finally terminated, and that the interest of the defendant in the railroad company and in the securities thereof had been closed up; that the defendant had received on account of the property transferred to him by the plaintiff, and as proceeds thereof, large sums of money, and

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particularly the sum of \$27,000 for the proceeds of a sale of the bonds and stock acquired by him pursuant to the agreement with the plaintiff, and that the balance of such proceeds, with the interest thereon, after deducting therefrom all the sums which the defendant may have advanced, expended or laid out in connection with the enterprise referred to in the agreement, directly or indirectly, according to the true intent and meaning of the agreement and in the manner therein provided, with the interest thereon, exceeded the sum of \$6,200, and interest thereon at the rate of seven per cent; that the consent of the Kings County Central Railroad Company to the payment by the defendant of the promissory note mentioned had been duly obtained, of which the defendant had notice, that the plaintiff has duly demanded of the defendant payment of the promissory note, and at the same time tendered to him the sixteen bonds of the railroad company which had been held by Foote, and by him transferred to the plaintiff, but that the "defendant refused and neglected to pay the same, and still refuses and neglects to pay the same, although the plaintiff has at all times been and still is ready and willing to deliver to said defendant said sixteen bonds upon receipt of payment of said note," and the plaintiff demanded judgment against the defendant for the sum of \$6,000 and interest from August 30, 1878, besides costs of the action.

To this complaint the defendant demurred on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled at Special Term upon the ground that the complaint stated a good cause of action to enforce a trust and for an accounting by the trustee. From the judgment overruling the demurrer the defendant appealed to the General Term of the Supreme Court, where that judgment was reversed, as appears from the opinion there pronounced, upon the ground that the agreement mentioned in the complaint did not create a trust; that the plaintiff seeking to enforce payment of the note occupied simply the position of an assignee from Foote; that Foote, if he had continued to

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own the note, could not have enforced payment under the agreement made by the plaintiff with the defendant because at the time of that agreement he did not hold any claim against the plaintiff, and the plaintiff was not indebted to him or under any obligation to him. Upon the decision of the General Term, judgment absolute was rendered against the plaintiff dismissing his complaint with costs.

J. W. Gilbert for appellant. The averments of the complaint are sufficient to show that plaintiff is the real beneficiary and is entitled to have the trust enforced. (*Barry v. Lambert*, 98 N. Y. 300, 306, 307; *Gilman v. McArdle*, id. 451; *Martin v. Funk*, id. 75; *Day v. Roth*, 18 id. 448; *Wright v. Douglas*, 3 Seld. 564; *Young v. Young*, 80 N. Y. 438; Hill on Trusts, 63-71; Perry on Trusts, 95; Pomeroy's Eq. Jur., §§ 997, 998, 999.) It was not necessary to make the other *cestuis que trust* parties to the action as the amount to be paid to the plaintiff was fixed by the contract by which the trust was created, and was to be paid primarily. (*Ger. Mut. Ins. Co. v. Benson*, 5 Duer, 168, 176; *Penman v. Slocum*, 41 N. Y. 53.) The defendant is liable to account for the proceeds of the sale of Litchfield's property. (*Manton v. Gould*, 69 N. Y. 220; *Belknap v. Bender*, 75 id. 446.) It is not sufficient to show that the particular cause of action indicated by the prayer for relief, or otherwise, is not supported by the facts averred. If those facts show that the plaintiff is entitled to any relief the court can adapt the relief to the case, and the demurrer must be overruled. (Code Civ. Pro., § 1207; *Hale v. Omaha Nat. Bk.*, 49 N. Y. 626-637; *Williams v. Slote*, 70 id. 601, 602; *Mackey v. Auer*, 8 Hun, 180, 182.) The facts averred bring the case within the principle that where one person, for a valuable consideration, makes a promise to another, for the benefit of a third person, that third person may maintain an action to enforce the promise. (Code of Civ. Pro., § 449; *Hubbell v. McHenry*, 53 N. Y. 93; *Lawrence v. Fox*, 20 id. 268; *Burr v. Beers*, 24 id. 178; *Ricard v. Sanderson*, 41 id. 179; *Thorpe v. Keokuk C. Co.*, 48 id. 253;

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Claflin v. Ostram, 54 id. 581, 584; *Glen v. Hope I. Co.*, 58 id. 379, 381; *Arnold v. Nicolls*, 64 id. 117; *Belknap v. Bender*, 75 id. 446; *Todd v. Weber*, 95 id. 181, 193.) The executor should be permitted to sue in the first instance, instead of being compelled to enforce his claim through the intervention of the plaintiff in his private and unofficial capacity. (*Bright v. Currie*, 5 Sand. 433; *Nicolls v. Hall*, 7 Hun, 580; *Merritt v. Seaman*, 6 N. Y. 168.) The transfer of the note to the executor made him the beneficiary, the defendant's undertaking being to pay the debt and not a particular person. (*Costar v. Mayor, etc.*, 43 N. Y. 399, 411; *Little v. Banks*, 85 id. 258, 263; *Barlow v. Myers*, 64 id. 41; *Simpson v. Brown*, 68 id. 360; *Ger. Nat. Bk. v. Taaks*, 31 Hun, 260, 261.)

Benj. F. Tracy for respondent. By the agreement annexed to the complaint Flint became the absolute owner of the property transferred to him by Litchfield, no trust in it being created in favor of Litchfield or any one else. (*Young v. Young*, 80 N. Y. 438; 2 Burrill's L. Dic. 549, 550; *Andrews v. Bible Soc.*, 4 Sandf. 156; *Hungerford v. Cartwright*, 13 Hun, 647.) Flint's promise to Litchfield to pay the debt of the railroad company to Foote is a promise, that cannot be enforced by Foote or his assignee, Litchfield's executor. (*Lawrence v. Fox*, 20 N. Y. 268; *Ætna Nat. Bk. v. Fourth Nat. Bk.*, 46 id. 92; *Throop v. Keokuk Coal Co.*, 48 id. 257; *Garnsey v. Rogers*, 47 id. 233, 240; *Burt v. Beers*, 24 id. 178; *King v. Whatley*, 10 Paige, 465; *Merrill v. Green*, 55 N. Y. 270; *Vrooman v. Turner*, 69 id. 284; *Turk v. Ridge*, 41 id. 201; *Cushman v. Henry*, 12 J. & S. 97; *Pardee v. Treat*, 82 N. Y. 385, 392; *Seward v. Huntington*, 94 id. 104.) The defendant by demurring did not admit the allegations in the complaint concerning the purpose and effect of the agreement annexed thereto. (*Bogardus v. N. Y. I. Co.*, 101 N. Y. 337.)

EARL, J. We are of opinion that the complaint states a good cause of action and that the demurrer was not, therefore, well taken.

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While the note mentioned in the complaint contains a promise to pay E. B. Litchfield, "executor of the estate of H. Maria Litchfield, deceased," the words quoted are mere *descriptio personæ*. There is nothing in the complaint showing that the loan was made by him as executor and in no other capacity; and upon the facts alleged in the complaint, if Litchfield had desired to commence suit directly upon the note against the maker thereof, he would have been obliged to commence it in his individual name, and in that capacity he could have recovered. (*Peck v. Mallams*, 10 N. Y. 509)

So, too, although in the title of this action, after the word Litchfield, the words "executors of the last will and testament of H. Maria Litchfield, deceased," appear, yet the action is the individual action of Electus B. Litchfield. The whole body of the complaint shows an action in his favor to enforce an agreement made by him individually with the defendant for the payment of the note given to and held by him individually. In such a case when the complaint shows a cause of action in favor of the plaintiff, not in his representative but in his individual character, the descriptive words may be rejected, leaving the action to stand as one in the individual capacity of the plaintiff. (*Merritt v. Seaman*, 6 N. Y. 168; *Stilwell v. Carpenter*, 62 id. 639; *Beers v. Shannon*, 73 id. 292; *Thompson v. Whitmarsh*, 100 id. 35.)

We agree with the General Term that this is not an action to enforce a trust, but simply to enforce the agreement of the defendant to pay the note held by the plaintiff which is set out in the complaint. It is quite clear that under the authority of *Lawrence v. Fox* (20 N. Y. 268); *Barlow v. Myers* (64 id. 41); *Vrooman v. Turner* (69 id. 280), and other like cases. Foote, if he had continued to hold the note, could, upon the facts alleged in the complaint, have compelled its payment by the defendant. His agreement to pay the note to Foote was founded upon an ample consideration passing to him from the plaintiff. At the same time the plaintiff was under a legal obligation or duty to Foote by virtue of his indorsement upon the note which he had trans-

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ferred to him, and his interest and obligation consequent upon his indorsement bring the case precisely within the rule laid down in *Vrooman v. Turner* (*supra*), in the following language: "A legal obligation or duty of the promisee to him (the third party) will so connect him with the transaction as to be a substitute for any privity with the promisor, or the consideration of the promise, the obligation of the promisee furnishing an evidence of the intent of the latter to benefit him, and creating a privity by substitution with the promisor."

It is true that the complaint does not very distinctly aver the indorsement by the plaintiff of the note, which was held by Foote at the date of the agreement. But the note was payable to plaintiff's order, and the complaint alleges that it was transferred to Foote, which, in the case of such a note, would imply its indorsement; it avers that payment of the note was demanded, and that it was protested for non-payment, and that notice of protest was duly served upon plaintiff. It is also alleged that the agreement was entered into for the purpose, among other things, of making certain provision for the payment of the note and the indebtedness of the Kings County Central Railroad Company evidenced thereby, and of indemnifying the plaintiff, as executor, from liability thereon. From all this language we think it can be inferred that the plaintiff was the indorser of the note while it was in the hands of Foote; and, therefore, the promise of the defendant became available to Foote, and the assignment and transfer of the note to the plaintiff enabled him as such assignee, standing in the shoes of Foote, to enforce the agreement.

But even if this were not so the conclusion would still be reached that the plaintiff could enforce payment of the note. The defendant promised to pay this note upon ample consideration furnished by the plaintiff. He thus became bound to some one to pay it. If he did not become bound to Foote, he certainly did to the plaintiff, and he having become possessed of the note can, not simply as assignee of Foote, but as a party to the agreement, enforce payment of the note. He holds not only all the rights, if any, Foote

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had under that agreement, but all the rights which he had thereunder as a party thereto, and there can be no doubt that he is in a position to enforce the promise the defendant made to him to pay the note.

Therefore, the plaintiff having become owner and holder of the note, having procured the consent of the Kings County Central Railroad Company to its payment by the defendant, and having tendered to him the sixteen bonds to which he was entitled under the agreement, and the enterprise mentioned in the agreement having been closed up and terminated, the defendant having ample funds for the payment of the note, we see no reason to doubt that the complaint sets forth a sufficient cause of action and that the demurrer should not have been sustained.

The judgment of the General Term, should, therefore, be reversed, and that of the Special Term overruling the demurrer affirmed; and the defendant should have leave to withdraw his demurrer and serve an answer within thirty days upon payment to the plaintiff of all the the costs since the service of the demurrer.

All concur.

Judgment accordingly.

STEPHEN W. MONK, Respondent, v. THE TOWN OF NEW
UTRECHT, Appellant

It is within the discretion of commissioners of highways of a town, where they have not sufficient funds in their hands to make all needed repairs, to apply the funds in making such repairs as in their judgment are most urgently needed, and they are not responsible for an error in judgment in doing so.

Under the provisions of the statute prescribing the method of laying out highways in the towns of the county of K. (Chap. 670, Laws of 1869), and in compliance with the provisions of the act of 1873 (Chap. 304, Laws of 1873), directing the commissioners appointed by the former act to lay out "Eighty-sixth street," said street was laid out and constructed in accordance with the plan laid down by the commissioners.

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The street was graded up in one place about thirty feet above the adjoining land. No provision was made in the plan for a railing or fence on the outer lines of the road at the top of the bank. The commissioners of highways of the town of N. U. (defendant), upon whom is imposed the duty of keeping that portion of the street in their town, when completed, in repair, kept the roadway in repair and in so doing expended all the moneys in their hands. In an action under the act of 1881 (Chap. 700, Laws of 1881), making towns liable in certain cases for injuries caused by a defective highway, to recover damages for injuries alleged to have been sustained by reason of negligence on the part of the commissioners in not erecting some barrier at the top of the bank. *Held: First.* The omission was not a defect in the highway. *Second.* Conceding it to have been such, as the commissioners of highways had expended the moneys in making other repairs they deemed more urgent, the town was not liable. *Third.* The defect if any, was in the plan and was not chargeable to the officers of the town. The street was laid out with a roadbed sixty feet wide, in the center of which was a street car track; on each side was a sidewalk eleven feet wide, raised about a foot above the level of the road, bordered near the gutter with a row of trees. Plaintiff, who had been drinking heavily, was placed in the center of the road, on a clear starlit night, with directions to follow the car track to his place of destination. He wandered off the road and fell down the bank. *Held,* that he was chargeable with contributory negligence.

(Submitted February 8, 1887; decided March 1, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 18, 1885, which reversed a judgment entered upon an order in favor of defendant, dismissing the complaint after verdict, and which directed a judgment in favor of plaintiff on the verdict.

This action was brought under chapter 700, Laws of 1881, to recover damages for personal injuries received in falling down an embankment of Eighty-sixth street, in the town of New Utrecht, which the complaint alleged had been negligently left by the commissioners of the town without a fence or railing.

The material facts are stated in the opinion.

Wm. Sullivan for appellant. A municipality, by virtue of its general obligation to keep in repair all the public improve-

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ments within its territorial jurisdiction, is not bound, although its streets may, in fact, be dangerous, either to remedy the defect inherent in the plan itself, or guard the traveling public against accidents from such defect. (*City of Detroit v. Buckman*, 22 Am. R., 507 [34 Mich. 125]; *City of Lansing v. Toolan*, id. 510 [37 Mich. 152]; *Urquhart v. City of Ogdensburg*, 91 N. Y. 67, 71; *Conrad v. Trustees of Ithaca*, 16 id. 158; *Weet v. Trustees of Brockport*, id. 161, 173; Laws of 1869, chap. 670; Laws of 1873, chap. 364, §§ 1, 2, 5, 9; Dillon on Munic. Corp. [3d ed.], § 974; *Maximilian v. Mayor, etc.*, 62 N. Y. 160; *Tone v. Mayor, etc.*, 70 id. 158, 165, 166; *Ham v. Mayor, etc.*, id. 459; *N. Y. & B. S. M. & L. Co. v. City of Brooklyn*, 71 id. 530; *Terhune v. Mayor, etc.*, 88 id. 248, 251; *Bamber v. City of Rochester*, 26 Hun, 587.) In this State the liability of towns in respect of their highways, under chapter 700, Laws of 1881, is prospective and only co-extensive with that of highway commissioners. (*Fraser v. Town of Tompkins*, 30 Hun, 168; *Eveleigh v. Town of Honesfield*, 34 id. 140; *Shepherd v. Lincoln*, 17 Wend. 250; *People v. Adsit*, 2 Hill, 619; *Smith v. Wright*, 27 Barb. 622, 631, 632; *Williams v. East India Co.*, 3 East. 192.) The highway commissioners could not have procured any more money than they received, nor could they provide themselves with any other means. (*Baker v. Loomis*, 6 Hill, 463; *People ex rel. Everett v. B'd of Supr's*, 93 N. Y. 397; Laws of 1869, chap. 800, § 6.) Under the circumstances the selection of the places to be repaired or fenced was necessarily referred to the discretion of the highway commissioners. (*Garlinghouse v. Jacobs*, 29 N. Y. 297, 308, 312, 313, 314; *Hover v. Barkhoof*, 44 id. 119, 120.) A public officer is not liable in a civil action, nor can he be reached by mandamus for an abuse or improper exercise of discretion in the discharge of a duty administrative or quasi judicial in its nature, no matter how corrupt or sinister his motive. The only remedy is by indictment. (Dillon on Munic. Corp. [3d ed.], § 949; *Wilson v. Mayor, etc.*, 1 Den. 595, 599, 600; *Weaver v. Devendorf*, 3 id. 117, 120, 121;

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Vail v. Owen, 19 Barb. 22; *Barhyte v. Shepherd*, 35 N. Y. 238; *People ex rel. Francis v. Common Council*, 78 id. 83; *E. R. G. L. Co., v. Donnelly*, 25 Hun, 614; 93 N. Y. 557; *Cain v. City of Syracuse*, 93 id. 83.)

A. Simis, Jr., for respondent. It was the duty of the highway commissioners of the town to keep the highways thereof in repair, and the town is made liable for all damages to person or property by reason of defective highways. (Laws of 1881, chap. 700; *Hyatt v. Trustees of Rondout*, 44 Barb. 385; 61 N. Y. 509; 51 id. 513; *Ring v. City of Cohoes*, 77 id. 83; *Gillespie v. Newburgh*, 54 id. 468; S. & R. on Negligence, § 39; *Hubbell v. City of Yonkers*, 35 Hun. 349.) The duty to keep the highway in repair is ministerial, and for a negligent omission to perform this duty, an action lies by the party injured. (*Hines v. City of Lockport*, 50 N. Y. 238; *Warren v. Clement*, 24 Hun, 474.) The commissioners of highways should be held liable for a neglect of duty as they have ample funds in their hands, and the injury to an individual occurs from their wrongful omission to use them, though they may not always have such funds. (*Robinson v. Chamberlain*, 34 N. Y. 395; *Hover v. Barkhoof*, 44 id. 113; *Olmstead v. Dennis*, 77 id. 382.) When improvements have been made to a street, the duty of keeping it in repair so as to prevent its being dangerous to the public is ministerial, and for a negligent omission to perform it an action by the party injured will lie. (*Hines v. Lockport*, 50 N. Y. 236; *Urquhart v. Ogdensburgh*, 91 id. 71; *Hubbell v. Yonkers*, 35 Hun, 349.)

RUGER, Ch. J. This action was brought to recover damages occasioned to the plaintiff, by falling down a slope or declivity, adjoining the road known as Eighty-sixth street, in the town of New Utrecht, Kings county.

This slope descended from the northerly exterior line of the sidewalk thirty feet, at an angle of about thirty degrees, and was intercepted near the middle, by a fence running

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parallel with the road. The road was built about the year 1874, and was laid out with a roadbed sixty feet wide, flanked on either side by sidewalks eleven feet wide, raised about one foot above the level of the road, and bordered near the gutters with rows of trees. It was located partly in the town of New Utrecht, and partly in Gravesend, and extended from the village of Bath to Fort Hamilton, both lying on or near the seashore, about two miles apart.

The accident occurred about ten o'clock in the evening, at a point nearly half way between the two villages; the plaintiff walking off the sidewalk and rolling down the embankment on the north side of the road, whereby he sustained bodily injuries.

The negligence complained of was the omission of the defendant to erect a railing or fence at the top of the bank sufficient to prevent persons using the highway from walking or falling down the declivity.

We are of the opinion that the town owed no duty to the traveling public to erect such fence, and that it was not negligence on its part, or that of its highway commissioners, to omit to do so.

The alleged defect was incident to the plan of the road and was created by the elevation of the road above the level of the adjacent land. Such irregularities are not at all uncommon in rural highways, and are not supposed to present any danger to the traveling public, when using ordinary care in the use of the road. The town had furnished a safe and sufficient roadway of unusual width, whose boundaries were indicated on either side by a gutter and elevated sidewalk, bordered by rows of trees; and was under no obligation to erect barriers to prevent travelers from wandering into the adjoining fields. No possible difficulty existed in this case to prevent a traveler from following either the road or sidewalk by marks which could both be seen and felt, and it would be imposing a burden beyond all precedent to require a town to remove irregularities in the surface of the land, outside of the road, for fear that some traveler might wander there and thus sustain injury.

Neither at common law nor by the statute were towns under any legal liability to respond in damages, even to persons injured by defects in the highways, until after the enactment of chapter 700 of the Laws of 1881.

A manifest difference in this respect, arising out of charter provisions, and the obvious requirements of the situation, exists between village and municipal corporations, and country towns, in respect to such obligations. (*Hyatt v. Trustees of Rondout*, 44 Barb. 385.) It was held in *People ex rel. Van Keuren v. Bd. of Town Auditors* (74 N. Y. 310) that "under our system no corporate duty is imposed upon towns in respect to the care, superintendence or regulation of highways within their limits." "Commissioners of highways have by the statute the care and superintendence of highways," and "they are responsible in a civil action for any injury resulting from their neglect to repair a highway (if provided with means for that purpose), whereby an individual sustains damages."

On the other hand, the town in its corporate character has no control over the highways. It cannot lay out a highway or discontinue one. It is not liable for failure to keep highways in repair, and has but limited corporate duties to perform in respect thereto. (*People ex rel. Everett v. Bd. of Sup'rs*, 93 N. Y. 397.)

By the act of 1881, however, it was provided that towns should thereafter be liable for such injuries in cases where the "commissioner or commissioners of highways of said towns are now by law liable therefor." It is seen that the liability of the towns, is thus made co-extensive with that of commissioners of highways in towns.

No absolute liability for such injuries was ever imposed by law upon such officers, but only a limited responsibility arising out of their negligence, to the extent only, that they were possessed of, or had power to obtain means to make necessary repairs. (*Hines v. City of Lockport*, 50 N. Y. 236; *Hover v. Barkhoof*, 44 id. 113.)

It does not affirmatively appear in what manner the commissioners of the town of New Utrecht were supplied with

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funds for the repair of its roads and bridges, but it is shown by the evidence of one of its commissioners that he received \$2,500 during the year 1882 for such purposes. It was testified to, that such sum was all expended in that year for the ordinary repairs of the roads and bridges, and was not entirely sufficient for that purpose.

The proof showed that from sixty-five to seventy miles of road were within the jurisdiction of the commissioners and required care, expense and repair, and, to have guarded the several places along said roads, where banks or declivities existed, would have required the erection of two or three miles of barriers, in addition to the expense for the legitimate repair of the roadbeds. Under such circumstances it was confided to the discretion of the commissioners to apply the funds in their hands in making such repairs, as in their judgment were most urgently needed, and they were not responsible for an error of judgment in doing so. (*Garlinghouse v. Jacobs*, 29 N. Y. 297; *Hover v. Barkhoof*, 44 id. 118.)

It was therefore error for the court below to charge the jury that if they found "that the great necessity was to keep the actual bed of the roadway safe, they were right in spending it in that way. But if you say it was of more importance to guard this highway then they were wrong."

The direct effect of this instruction was to authorize the jury to find the defendant liable for an error in judgment on the part of its highway commissioners, in a case where they were unable from want of means, to repair all of the defective places, in the highways of the town.

There was not the slightest evidence in the case as to the respective needs of the various places in the highways requiring repairs, and no ground exists upon the evidence for imputing even an error in judgment to them, in expending the funds in their hands.

The exception to the charge was well taken.

We are also of the opinion that under the method in force for laying out and building public roads in the county of Kings, the defect, if any, in the road in question arose from

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an error in the plan of the road, and was not chargeable to the officers of the town.

It is provided by chapter 670 of the Laws of 1869, that roads and streets in the towns of Kings county shall be made by certain commissioners, consisting of the respective supervisors of the towns of New Lots, Flatbush, Flatlands, New Utrecht and Gravesend, and the chairman of the board of supervisors of Kings county. They are to have exclusive power to lay out such streets, avenues and public places, of such width, extent and direction as they shall decide, and after the adoption of such permanent plan, no street or avenue shall be laid out in such towns, except in accordance with said plan, and all streets or avenues afterwards opened, shall be made to conform to such permanent plan, and the lines thereof. Such plan is required to be filed in the clerk's office of the county. By chapter 364 of the Laws of 1873, these commissioners were directed to lay out and place upon their map Eighty-sixth street, in accordance with certain conditions therein specified for its direction and location, and this street was afterwards laid out and entered by said commissioners in conformity thereto.

It was further provided in the same act that, upon the application of any freeholder whose land should be taken for such road, the County Court of Kings county, or a Special Term of the Supreme Court therein, should appoint three freeholders of New Utrecht and Gravesend to appraise and award damages to the several persons whose land was required for such road, and should also assess such persons and all others owning land within one hundred feet on either side of such road, for the aggregate amount of such awards and the expense of making such awards and assessments. Appropriate provisions were also made to enforce and collect such assessments and awards. Upon the confirmation of the report of such commissioners by the court, it was further provided that three other commissioners should be appointed by the said courts, or one of them, in the same manner as the previous commissioners had been appointed, to regulate and grade for

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public travel such street, and to plant trees along the sidewalks, and erect suitable signs with the names of any intersecting streets or avenues thereon, and assess the expense thereof upon the premises lying on either side of said street within one hundred feet thereof.

After the grading of said street should be completed, it was provided that the owners of the adjoining premises on either side might fence their lots along the street, and it was then further enacted that the said street so "laid out and mapped should be a public highway and the portions thereof situate within the towns of New Utrecht and Gravesend, shall be kept in repair by the commissioners of highways of those towns respectively."

We have thus stated all of the statutory provisions applying to the subject upon which the defendant's liability, if any, must be predicated.

No complaint is made that the commissioners of highways of the defendant, have not kept the road-bed and sidewalks of Eighty-sixth street in perfect repair since they came under their charge, or that the road was not constructed in every respect, according to the plan laid down by the commissioners charged with the duty of making it.

The charge is that a grade laid out and designed by the street plan outside of the roadway, and not apparently dangerous to persons traveling thereon, was not rendered inaccessible to persons from the sidewalk, by a fence or railing.

We are unable to see any duty resting upon the town to make such fence. The entire duty of laying out, constructing and grading this road, as a finished highway was expressly imposed upon the commissioners named in the statutes, and no duty, except that of keeping the street when completed in repair, was confided to, or imposed upon the town authorities.

The statutory commissioners were clothed with power and funds to make a safe and complete roadway, finished in all respects, and they undoubtedly supposed they had done so when they turned it over to the town.

All questions as to the feasibility and safety of the route

selected, and of the security of the plan of structure to be adopted, were devolved by statute upon the commissioners charged with the work of making such plans, and the duty of determining these questions was clearly judicial in its nature, dependent upon the judgment and discretion of the body authorized to perform it.

The commissioners were called upon, in constructing a plan, to decide upon the safety of the route adopted, and the dangers thereby to be encountered, and if safeguards were necessary to protect travelers in passing dangerous places, to provide them, and if they failed to do so it constituted simply a defect in the plan of the work arising from an error in judgment as to its necessities. For such errors it is well settled that no liability arises. (*Urquhart v. City of Ogdensburg*, 91 N. Y. 67, S. C., 97, 238.)

We also think that the order of the trial judge granting a nonsuit was supported, by the lack of proof showing the plaintiff free from contributory negligence.

The evidence showed him to be the inmate of an inebriate asylum, and that on the day of the accident he had leave of absence for a day, under a pledge that he would abstain from intoxicating drinks during that time. Although he denies that he became intoxicated, he admits that he spent the entire day in going from one saloon or tavern to another, taking beer and other refreshments at each. He is described by every disinterested witness in the case as much intoxicated.

When the circumstances of the accident are considered it is rendered quite clear that it could have happened only by gross carelessness. It occurred on a clear starlit night soon after he had been placed in the middle of a straight, wide road upon which there was a street car track. The road itself was bordered by trees, gutter and a sidewalk. He was directed to his destination, by a person who had guided him half of the way, and told to follow the car track. Objects could be seen plainly for two hundred feet, and no reasonable excuse for his walking off this road seems to exist except the plaintiff's intoxicated condition.

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We think the order of the General Term should be reversed and the judgment of nonsuit affirmed, with costs.

All concur.

Judgment accordingly.

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THE SILSBY MANUFACTURING COMPANY, Appellant, v. THE
STATE OF NEW YORK, Respondent.

The act of 1818, incorporating the S. L. N. Co (Chap. 144, Laws of 1818), gave to that corporation the right to use only so much of the waters of Seneca river, for the purposes of navigation on its canal, and forbade its use by it for any other purpose.

The State having acquired, under the act of 1825 (Chap. 271, Laws of 1825), "the stock property and privileges belonging or appertaining to" said company, and only that has no authority to use any more of the waters of said river than are necessary for the purposes of navigation, and has the right to use them only for that purpose.

Upon trial, before the board of claims, of a claim for an unlawful diversion by the State of the waters of said river, it appeared that on account of defects in the locks, gates, walls, etc., of said canal more water was diverted from the river than the superintendent of public works, in the exercise of his discretion, required for the use of the canal and more than was necessary for navigation, and that if said structures had been in a condition not to leak, the claimant, a riparian proprietor and mill owner on the river, would have had the use of a portion of the surplus water so diverted. *Held*, that the claimant made out a case which would have created a legal liability as against an individual: and so, that under the act of 1870 (Chap. 321, Laws 1870), he was entitled to his damages; also, that the State was not the sole judge of the necessity and of the amount to be taken, but it was incumbent upon it to prevent leakage or other wastage to a more than fair and reasonable extent; and that a finding of negligence on the part of any officer of the State was not necessary.

The diversion for which the claim was made was for the years 1882, 1883 and 1884. The claim was filed in August, 1884. *Held*, that the statute of limitations was not a bar to the claims for 1883 and 1884, that each day the unlawful use was continued a new cause of action arose; and that, as no recovery could be had for future damages, a failure to file a claim within the time limited by the statute, after the commencement of the unlawful diversion, had no effect on the rights of the claimant to recover damages sustained within the two years limited.

(Argued February 8, 1887, decided March 1, 1887.)

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APPEAL from a decision of the board of claims March 14, 1886, awarding the claimant nothing, on a claim for damages alleged to have been sustained by reason of an unlawful diversion by the State of the waters of Seneca river.

The material facts are stated in the opinion.

Theodore Bacon for appellant. In the absence of evidence to the contrary, the claimant, as riparian owner, is entitled to the natural flow of water in the Seneca river past its premises, without interference from State, corporation or individual. (*Chenango Bridge Co. v. Paige*, 83 N. Y. 178; *Smith v. City of Rochester*, 92 id. 463.) There was no warrant for the extensive invasion of the claimant's rights, of which it now complains. (Laws of 1825, chap. 271; Laws of 1813, chap. 144.) The plaintiff made out a clear case, entitling him to a recovery. (*Sipple v. State*, 99 N. Y. 284, 289, 292.)

Denis O'Brien, Attorney General, for respondent. The State having permanently appropriated the waters of the Seneca river for the use of the Seneca and Cayuga canal, by chapter 271 of the Laws of 1825, and also by the resolutions of the canal board and the acts of the canal commissioners, it has a superior right to the claimant to the waters of the river. (*Rexford v. Knight*, 11 N. Y. 308; *Germain v. Wagoner*, 1 Hill, 279; *Wagoner v. Germain*, 7 id. 357; *Varick v. Smith*, 5 Paige, 137; *People ex rel. Porter v. Tompkins*, 40 Hun, 230; *Mark v. State*, 97 N. Y. 572; 1 R. S., [7th ed.] 668-672.) The State is not liable for a leakage which diminishes the quantity of water which would otherwise escape over the dam and into the natural bed of the stream, thereby diminishing the quantity of water the claimant might take from the stream and thus indirectly causing him injury. (*Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 107.) The claim is barred by the statute of limitations. It was not filed within two years after the first diversion of water complained of took place. There had been no change in the condition of the canal for many years. (*Law v. McDonald*, 62 How. 340; *Porter v. Carp*, 22 Hun, 278; *Secor v. Sturgis*, 16 N. Y. 554; *Mark v. State*, 97 id. 580.)

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PECKHAM, J. The claimant, a manufacturing corporation, located at Seneca Falls, filed its claim against the defendant, in substance alleging itself to be a riparian owner of land adjoining the Seneca river or an island therein known as Dey's Island, and upon which it had erected valuable buildings, and that it was the owner of valuable water power and hydraulic rights by means of a water-way called Dey's race, and that it employed this water power as a motor to propel its machinery in its buildings. It was further alleged that the State maintained and operated a canal known as the Cayuga and Seneca canal, which ran through the village of Seneca Falls, and the canal was divided into various levels by means of locks for the purpose of facilitating the passage of boats, etc. That the State had built a wall of a proper height to protect navigation, and that where the locks, gates, levels and walls were in proper condition by being tight and secure the surplus water coming into the upper level spilled over this wall and over a dam and a portion thereof passed over a lower dam into Dey's race and became available to claimant as a motor to propel its machinery. That in the years 1882, 1883 and 1884, the walls, locks, gates, levels, etc., were not kept by the State in a proper and tight condition to prevent leakage and wastage, and that large quantities of water wasted through these locks, gates and levels, and were diverted from Dey's race, and the claimant was thereby compelled to use steam instead of the water which otherwise would have flowed through Dey's race and have been used by it. Damages to the extent of \$3,500 per year for these years were claimed. On the trial evidence was given tending to prove the facts above set forth, and the State in answer made the claim that it was entitled to the use of all the waters and that the claimant was only entitled to the use of such surplus as the State chose to give. What the rights of the parties are is the question in contention in this case.

The claimant proved itself to be a riparian owner and entitled to the use of the waters in Seneca river, as such riparian owner, in their natural flow without any interference

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from the State, except in so far as its rights had been legally altered by the action of the State. (*Chenango Bridge Co. v. Paige*, 83 N. Y. 178; *Smith v. City of Rochester*, 92 id. 463.)

The right of the State to use the waters of Seneca river for canal purposes arises from two acts of the legislature and action taken under them.

The first act (Chap. 144 of the Laws of 1813), incorporated the Seneca Lock Navigation Company for the purpose of improving the navigation between the Seneca and Cayuga lakes. Power was given the corporation to take lands, goods, chattels and effects not exceeding ten thousand dollars in value, and any land for the purposes of navigation. The ninth section provided that "whenever the navigation shall be completed, any owner or occupant of any land adjoining the said outlet may use the waters for mills or other hydraulic works, but such use shall at no time impede the passage of boats or other water craft or articles, or injure or affect the navigation on the canals, locks or dams or appurtenances belonging to the said corporation. Provided, that nothing in this act shall authorize the said corporation to use any of the waters of said outlet for any other purposes than for the navigation aforesaid." Power is also given by the next section to the owners of mills to make cuts to conduct the water to their mills, so, however, as not to impede the navigation or "prevent the company from the use of so much water as at all times shall be necessary for the purposes of said navigation."

We think the meaning of this statute, taking the two provisions together, is that the company shall not use any of the waters for any other purposes than for navigation and only enough as shall be necessary for those purposes.

Stock was issued and the company went on and built its locks and constructed its works under this act.

In 1825 (Chap. 271), an act was passed authorizing the construction of the Cayuga and Seneca canal, the first section of which contained a proviso that the canal commissioners should not proceed in their duties under the act until the State should be invested with the right and title to the stock,

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property and privileges of the Seneca Lock Navigation Company. Provision was made for acquiring such property, to wit, "the lands, waters, canals, locks, feeders and appurtenances thereto appertaining and claimed by the said company for the purpose of navigation under its act of incorporation, etc."

Upon payment, as provided for in the act, the State was to "be invested with all the stock, property and privileges belonging or appertaining to the said Seneca Lock Navigation Company."

This title, and this only, the State did subsequently secure. The board of claims found that the superintendent of public works has the entire control and management of all the canals, including the one in question, and that the amount of water to be used by the State is entirely a matter of discretion with him; that he might use all the water if he deemed it necessary.

It was also found by the board that if the locks, gates, walls, etc., should be changed by the State more water might be saved and the quantity of surplus water, over and above that necessary in the discretion of the superintendent for the use of the canals, increased, and in that event the claimant herein would be entitled to its proportion of increase.

As conclusions of law the board found that the State owed no duty to the claimant herein in the increase of surplus water, and that the board had no power to review the discretion of the superintendent of public works in the amount of water he shall use in the management of the canal. The claim was, therefore, dismissed. Proper exceptions were filed to the findings of fact and conclusions of law. The board was requested to find, as a fact, what seems to have been established by uncontradicted evidence, viz., that if the locks, gates, etc., had been in such condition as not to leak, there would have been a saving of 5,250 cubic feet per minute, which but for such diversion would have passed into the race, and which was above the amount necessary for navigation. That the amount thus escaping, and some portion of which would have reached the flume of claimant, would produce fifty-five horse-power, which cost claimant \$3,000 per annum.

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The board refused to find these facts, and upon the finding of the board, as made by it, all these facts were immaterial and a refusal to find them entirely proper.

By chapter 321 of the Laws of 1870, the State provided for a recovery of damages sustained by any individual from the canals of the State and from their use and management, provided the facts proved made out a case which would create a legal liability against the State were the same established in evidence in a court of justice against an individual or corporation, and jurisdiction to hear such claims was conferred upon the canal appraisers, and that jurisdiction was transferred to the board of claims by the act chapter 205 of the Laws of 1883, § 13.

In relation to this act, assuming liability on the part of the State, this court has said, per RUGER, Ch. J., in *Sipple v. The State* (99 N. Y. 284-288), "the object in view was the protection of the citizen, and not the exemption from liability of the State; and it is quite evident that the State thereby intended to assume, with reference to the management of the canals, the same measure of liability incurred by individuals and corporations engaged in similar enterprises, and to afford to parties injured the same redress which they would have against individuals and corporations for similar injuries."

Judged upon this measure of liability, and by this standard, we cannot doubt that the board of claims erred in its construction of the relative rights of the parties to this controversy. The State had a right to all these waters for no other purpose than that of navigation, and only so much as should at all times be necessary for such purpose. We do not see upon what principle it can be said that the State was to be the sole judge of that necessity and of the amount to be taken. It succeeded only to the rights of the lock company, and it has not since acquired any other or different rights. If it desired more it could easily acquire more by the exercise of its right of eminent domain, but so far its rights must be decided as they exist in its character as successor to the rights of the lock company.

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We do not believe that it would ever have been contended that the company was the sole judge of the amount necessary for its purposes of navigation. Undoubtedly the acts of the agents of the State, in the use of the water, would be entitled to a quite liberal construction. The question would not probably be, has the State used no more water than was absolutely necessary for the purposes of navigation, and have its gates and locks been kept up to the highest state of efficiency and in the best possible repair, and have the most effective appliances been used to guard against the leakage of water, but the inquiry would be whether, taking the whole facts into consideration, all the circumstances surrounding the case, the State had done what was fairly and reasonably incumbent upon it to do in the use of the water for navigation purposes, and in the prevention of leakage, or other wastage, to a more than fair and reasonable extent.

The exception of the claimant to the finding of fact, that the superintendent of public works had power to use all the water, etc., as above stated, possibly might not raise the question, for even on that assumption the State may not have used any more water than was reasonably sufficient under the circumstances. Hence the materiality of the facts which the claimant requested the board to find in regard to the amount of water which was diverted by leakage, and what could have been done with it by the claimant if it could have had the use of it.

Upon a new hearing the whole case will be open to investigation, and it will be for the board to decide, in view of all the facts, whether the State is using more water than is fairly and reasonably necessary for purposes of navigation, or is taking fair and reasonable precautions to prevent unreasonable waste of water not for navigable purposes.

The sections of the Revised Statutes called to our attention by the attorney general, are not, in our view, relevant. They refer generally to cases where the State has obtained the right to use all the water, unconditionally and absolutely, and lets the surplus under conditions provided for in the

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statute. They do not touch such a case as this where the State has no right to the use of the water for any but navigation purposes, and only for such as may be necessary for that purpose, and where the balance has never been taken from the original riparian owners. But even the statute referred to by the attorney general expressly reserves the right of the owner of hydraulic privileges prior to any grant from the State, unless his damages for the loss of such rights are duly assessed and paid. (1 R. S. [7th ed.] 669, § 84.)

It is not necessary that there should have been a finding of negligence on the part of any officer of the State, or a request to so find. The exception to the finding as to the absolute discretion of the superintendent of public works, taken in connection with the refusal to find facts material to the issue as to unlawful use of the waters by the State, and the exception to such refusal, are sufficient to bring the question before the court. And this first exception is noticed in the notice of appeal which is broad enough to permit the question to be raised and decided here.

The defense of the statute of limitations is made to the whole of the claim herein set forth. The claim was filed in August, 1884. It is good, undoubtedly, as to the claim for 1882. We think it equally clear that it is not good for the other years, 1883, 1884.

If the proper facts upon which to base an action were found, it would then appear that the State had unlawfully used a certain amount of water, to the use of which the claimant had an undoubted right, and every day such use continued a new cause of action arose therefor in favor of the claimant. Of course, when action was commenced all causes then existing would have to be included, but a recovery for the damages sustained, up to the time of the commencement of the action, would be no bar to those subsequently arising for subsequent unlawful diversions.

The diversion being unlawful, it is not to be presumed that it will be continued; hence no foundation is laid for a recovery of damages that might be sustained in the future. (*Uline v.*

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N. Y. C. & H. R. R. R. Co., 101 N. Y. 98.) Besides the amount of the diversion is liable to vary from day to day, or hour to hour, and so wholly unstable would be the data that it would be entirely impossible to figure or reason upon the probable or possible amount of damage to accrue in the future.

As damages could not be predicated of the future, so a failure to sue for past alleged damages would have no effect upon the rights of the claimant within the period not barred, which in this case is by the statute stated to be two years. For the damages, if any, which claimant has sustained for the two years prior to the commencement of this action, it is entitled to recover, the question to be determined by the rules we have laid down and upon the facts which may then appear in proof. To give the claimant the opportunity of proving the necessary facts, and the defendant any answer there may be to the claim upon the principles here laid down, the award must be reversed and the case sent back to the board of claims to be reheard, costs to abide event.

All concur.

Ordered accordingly.

THE PEOPLE ex rel., NICHOLAS HAUGHTON et al., Appellants, v.
WILLIAM S. ANDREWS et al., Respondents.

The office of commissioners of excise, is within the purview of the act "to center responsibility in the municipal government of the city of New York" (Chap. 48, Laws of 1884); and where an appointment to that office was made by the mayor after said act went into effect (January 1, 1885) *Held*, that a confirmation by the common council was not required to entitle the appointee to the office.

(Argued February 9, 1887; decided March 1, 1887.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made the first Monday of October, 1886, which directed judgment in favor of the defendants upon a case submitted under section 1279 of the Code of Civil Procedure

Statement of case.

The facts agreed upon are set forth in substance in the opinion.

A. J. Dittenhoefer for appellants. Commissioners of excise are State and not municipal officers. (Laws of 1870, chap. 175; Laws of 1874, chap. 444; Laws of 1855, chap. 231; Laws of 1857, chap. 628; Laws of 1873, chap. 149; Laws of 1874, chap. 444; Laws of 1882, chap. 126; Laws of 1883, chap. 340; Laws of 1886, chap. 496; Cooley on Const. Lim. chap. 16, § 575; 2 Dillon on Munic. Corp. § 772; *Russell v. Mayor, etc.*, 2 Den. 464; *N. Y. & B. S. M. Co. v. City of Brooklyn*, 71 N. Y. 580; 8 Hun, 37; *Landon v. Mayor, etc.*, 39 Supr. Ct. 467; *People ex rel. Stiner v. Morrison*, 78 N. Y. 84; *Quinn v. Mayor, etc.*, 44 How. Pr. 266; *Dannat v. Mayor, etc.*, 6 Hun, 91; *Ham v. Mayor, etc.*, 37 Super. 458, 468; *Whitmore v. Mayor, etc.*, 67 N. Y. 21; *Connor v. Mayor, etc.*, 17 Hun, 439; *Tone v. Mayor, etc.*, 70 N. Y. 157; *Heizer v. Mayor, etc.*, 29 Hun; 446; *Terhune v. Mayor, etc.*, 88 N. Y. 247-251; *Gardiner v. B'd of Health*, 10 id. 409; *People v. Town Auditors*, 74 id. 315; *Horton v. Thompson*, 71 id. 513, 524; *Mayor, etc., v. Buel*, 12 Daly, 494; *Smith v. People*, 47 N. Y. 330, 339.) Being State officers their appointment is not included in or governed by the act of 1884. (*Ex parte Heath*, 3 Hill, 42, 52; *Whitmore v. Mayor, etc.*, 67 N. Y. 22; *Landon v. Mayor, etc.*, 49 How. 218; 39 Super. 467; 67 N. Y. 22; *Jarvis v. Mayor, etc.*, 49 How. 354; *People ex rel. Taylor v. Dunlap*, 66 N. Y. 162, 166; 67 N. Y. 93.) As the act of 1884 is a local special law, not repealing in express terms the act of 1870, and as both acts can consistently co-exist, the later is not impliedly repealed by the former. (*McKenna v. Edmundstone*, 91 N. Y. 231; *Whipple v. Christian*, 80 id. 523; *In re Evergreens*, 47 id. 216; *Bowen v. Lease*, 5 Hill, 225; *Van Denburgh v. Village of Greenbush*, 66 N. Y. 1; *People ex rel. Stiner, v. Morrison, supra*; Laws of 1870, chap. 175, §§ 2, 6; *Perkins v. Hill*, 56 N. Y. 90.) As the act of 1884 relates only to appointments made by the mayor, it does not apply

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to excise commissioners. (1 Bouvier's Law Dict. 109; 2 id. 232; *People ex rel. Babcock v. Murray*, 70 N. Y. 521, 526; *People ex rel. Kressner v. Fitzsimmons*, 68 id. 514.)

Charles W. Dayton for respondents. The power to appoint commissioners of excise is purely local, and the claim that they are State officers does not affect the issue. (Laws of 1857, chap. 628; Laws of 1870, chap. 175, § 2; Laws of 1873, chap. 549; Laws of 1882, chap. 410; *Bd. of Excise v. Garlinghouse*, 45 N. Y. 249, 251; *People v. Smith*, 69 id. 175, 181.) The act of 1884 (Chap. 43) is not unconstitutional. (*Bd. of Water Com'rs v. Dwight*, 101 N. Y. 9; *Neuendorff v. Duryea*, 69 id. 557.) A statute can be repealed only by an express provision of a subsequent law, or by necessary implication. To repeal a statute by implication there must be such a positive repugnancy between the provisions of the new law and the old that they cannot stand together or be consistently reconciled. (Potter's Dwaris on Statutes, 155, 156.) The legislature could abolish the office of excise commissioners, or change their character from State to city officers, and provide for a different mode of appointment. (*People ex rel. Taylor v. Dunlap*, 66 N. Y. 166, 167, 168; *People v. Pinckney*, 32 id. 377; *Ham v. Mayor, etc.*, 70 id. 463.) The statute of 1884 was, in fact, not an amendment and repeal of the excise law of 1870, but an amendment of a local law and an amendment of the charter, as to the manner of the appointment of these officers, which the legislature had already declared it might regulate. This certainly was within the power of the legislature. (*People v. Petrea*, 92 N. Y. 141; *In re Mayor, etc., of N. Y.*, 99 id. 569; *Bd. of Water Com'rs v. Dwight*, 3 East. R. 209; *Gere v. Whitlock*, 92 N. Y. 191; *Kerrigan v. Force*, 68 id. 384; *People v. Fitzsimmons*, id. 514; *People ex rel. Kelley v. Common Council*, 77 id. 508, *Landers v. F. St. M. C. of Rochester*, 97 id. 124; *People v. Gold and Stock Tel. Co.*, 98 id. 67; *People ex rel. Wood v. Lacombe*, 99 id. 51.

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DANFORTH, J. Upon a case submitted under section 1279 of the Code of Civil Procedure, it appeared that the relators Nicholas Haughton and John J. Morris, and one William P. Mitchell, were nominated to the board of aldermen of the city of New York, as commissioners of excise in the city of New York, by the mayor of that city, prior to the 1st day of May, 1883, pursuant to chapter 175 of the Laws of 1870, and the nominations duly confirmed by its board of aldermen; that the relators severally took the oath of office and duly qualified as such commissioners of excise, and entered upon the discharge of their duties as such. That their term of office was to be three years from the 1st day of May, 1883, and to continue until others should be appointed in their places. That on the 1st day of May, 1886, the mayor of the city of New York named the defendants and respondents, William S. Andrews, John Von Glahn and Charles H. Woodman, to be commissioners of excise in the city of New York, by written appointment as follows :

“ MAYOR’S OFFICE,
“ NEW YORK, *May 1, 1886.* }

“ Under and in pursuance of section 109, chapter 410 of the Laws of 1882, and of chapter 43 of the Laws 1884, I hereby appoint John Von Glahn a commissioner of excise in the city of New York for the term of three years from May 1st, 1886, in place of John J. Morris, whose term of office has expired.

[L. s.]

“ W. R. GRACE,
“ *Mayor.*”

And in the same words each of the others.

That neither of the said several appointments of the defendants and respondents, made on the 1st day of May, 1886, have been submitted to, nor have such nominations, or any or either of them been confirmed by the board of aldermen of the city of New York.

That they have respectively taken the oath of office as such commissioner of excise, and are performing the duties of

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commissioners of excise, and claim to be regularly in office, without confirmation by the board of aldermen of said city.

The question submitted to the court was :

Are the defendants and respondents the legal successors in office of the relators ?

We are of opinion that they are. It is declared by statute (Chap. 43, Laws of 1884, § 1), that, "all appointments to office in the city of New York, now" (March 17, 1884), "made by the mayor and confirmed by the board of aldermen, shall after that time be made by the mayor without such confirmation," and by section 2, that the act shall take effect January 1, 1885. The relators were appointed under the act of 1870 (*supra*), upon nomination by the mayor and confirmation by the board of aldermen. Except for the subsequent act of 1884 (*supra*), their successors would have been appointed in the same way. The act of 1884 works a change in the manner of appointment, and has been complied with. It is really difficult to find an argument to make clearer the proposition that they are the legal successors in office of the relators. It is argued to the contrary that "excise commissioners are State and not municipal officers." Concede that to be so. Prior to 1884, the power to appoint was local, and the relators took office under a statute which vested the appointing power in the mayor and aldermen. For every act done by them in an official capacity, they must have justified under a commission derived from that source, and in answer to a *quo warranto*, could have shown no other title to office. No doubt their duties affect the general public, but they are to be performed within the same limits as those which confine the municipality, the moneys collected through them are to be paid into the city treasury for the benefit of the city and as its property. At one time they were applied in payment of the city debt (Chap. 549, Laws of 1873), and afterwards given to benevolent institutions, under appropriations made by the board of estimate and apportionment of the city (Laws of 1874, chap. 642). The salaries of the commissioners were by the act of 1870 (Chap. 175), to be fixed by the mayor and common council, and paid as those of

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other city officers are paid, and by the act of 1873 (*supra*), the salaries of the commissioners as well as the hire of their employes and the other necessary expenses of the board, were fixed by the board of estimate and apportionment of the city and paid by its comptroller.

While, therefore, they may be in one sense, and that a technical one, State officers, their dependence upon the city and its municipal government is manifest, and we see no reason to suppose they are not within the purview of the statute under which the defendants were appointed. (Laws of 1884, *supra*.) They are within its letter, and the body of the act is not restrained by its title. It is "An act to center responsibility in the municipal government of the city of New York."

It expresses an intent to bestow upon one person greater power, and to relieve all others of a divided responsibility, and this intent was effected by giving to the executive head of the municipality the sole power of appointment, thus making him individually responsible for its proper exercise. The title and body of the act concur, and the parties to this controversy are so obviously within its condition that we find no objection of the appellants to be well founded.

The judgment appealed from should, therefore, be affirmed.

All concur.

Judgment affirmed.

THOMAS H. ROBBINS, Appellant, v. WILLIAM W. BUTCHER, as Assignee, etc., Impleaded, etc., Respondent.

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An assignment for the benefit of creditors contained a provision that, "should it be necessary and to the better performance of the trust," the assignee shall have power "to finish such work as is unfinished," paying the necessary charges and expenses before paying the debts and liabilities as provided for in the assignment. In an action to set aside the assignment as fraudulent, *held*, that no power to determine as to the necessity was vested in the assignee by the instrument; but that the

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power conferred was conditioned upon a necessity to be determined by the court; that the assignee could not safely exercise it except under order of the court, and in case he attempted so to do might be restrained at any moment; and that, therefore, the provision did not vitiate the assignment.

Dunham v. Waterman (17 N. Y. 9), distinguished

(Argued February 8, 1887; decided March 1, 1887.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made December 14, 1885, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial.

This action was brought to set aside an assignment, for the benefit of creditors, made by defendant George W. Brown, to defendant William W. Butcher.

The complaint alleged the recovery of two judgments in favor of plaintiff against the assignor, the issuing of executions thereon and returns thereof unsatisfied, the execution of the assignment, a copy whereof was attached to the complaint, and which it was alleged was fraudulent and void on its face.

The motion to dismiss the complaint was made on the ground that it did not state facts sufficient to constitute a cause of action.

The provision of the assignment which plaintiff claimed vitiated it, is set forth in the opinion.

Edgar J. Phillips for appellant. The clause in the assignment, authorizing the assignee to finish unfinished work and to complete incompleated buildings, and for that purpose and to that extent to carry on the business of the assignor, and to pay all necessary charges and expenses for such completion before paying any debts, including this plaintiff's, renders the assignment void. (*Dunham v. Waterman*, 17 N. Y. 9, 18, 20.) The provisions in the assignment in the case at bar vested a discretionary power in the assignee, which rendered it void. (*Rapalyee v. Stewart*, 27 N. Y. 310, 316; *Leroy's Case*, 1 Abb. [N. C.] 177.) If the provision were valid the

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court could not substitute its discretion in the place of that of the assignee. (*Nicholson v. Leavitt*, 6 N. Y., 510, 520.) The authority to finish work and to complete buildings renders the assignment void upon its face. (*Watson v. Butcher*, 37 Hun, 392, 393.)

William G. Cooke for respondent. In construing an assignment for the benefit of creditors the courts will seek such construction as will uphold and not invalidate it, and ambiguous language in the instrument will not be read as conferring an unlawful power upon the assignee if capable of any other interpretation. (*Kellogg v. Staruson*, 11 N. Y. 302, 305; *Townsend v. Stearns*, 32 id. 215; *Benedict v. Huntington*, 32 id. 219; *Coyne v. Weaver*, 84 id. 386.) If necessary to the better performance of his duty the assignee will be bound to complete the buildings whether the assignment so provided or not; and if not necessary there is nothing in the instrument which authorizes him to do it. The provision is, therefore, merely a useless and harmless piling up of words. (*Townsend v. Stearns*, 32 N. Y. 217; *Van Dine v. Willett*, 38 Barb. 319; *Whitney v. Krows*, 11 id. 198; *Jessup v. Hulse*, 21 N. Y. 173.) The test of validity always is whether the instrument contains any provision, which, if carried out, will interfere with the court's supervision of the trust. (*Jessup v. Hulse*, 21 N. Y. 170; *Dunham v. Waterman*, 17 id. 9; *Smith v. Beattie*, 31 id. 545.) The provision in the power of attorney, contained in the assignment, authorizing the assignee to execute all mortgages and other necessary instruments, does not vitiate the whole deed. (*Darling v. Rogers*, 22 Wend. 483; *Van Nest v. Yoe*, 1 Sandf. Ch. 6; *Vorhees v. Pres. Church*, 8 Barb. 150; *People v. Van Rensselaer*, 9 N. Y. 339; *Curtis v. Leavitt*, 15 id. 124.)

FINCH, J. It is to be expected that the unpreferred creditors of an assignor, regarding his transfer as an obstacle to the recovery of their debts, will often assail it either as fraudulent in law or in fact, sometimes justly and sometimes

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upon quite narrow and technical grounds. In either event our duty is to both parties, not hesitating where fraud is proved or ought conclusively to be inferred, but preferring a construction where the choice is open, which indicates innocence rather than fraud. The question raised on this appeal is to some extent a question of such construction and arises solely upon the language of the instrument. It contains a provision thus expressed: "And it is further provided that should it be necessary and to the better performance of the trust that the party of the second part shall have full power and authority to finish such work as is unfinished, to complete such buildings as are incompletd, and to pay all necessary charges and expenses for such completion prior to the payment of all debts and liabilities hereinbefore mentioned and provided." The repetition of the word "that" permits it to be said that this provision is an unfinished sentence and confers no authority at all, but no such criticism is made, and the meaning of the language is more accurately expressed by disregarding the word "that" where it occurs the second time. Both parties have argued the case upon such construction. The appellant claims that the provision confers upon the assignee an authority derived from the assignor to unduly delay the execution of the trust and divert the trust funds, in the exercise of his discretion, and free from the supervision and control of the courts, and so is fraudulent and void upon its face. The respondent contends that the authority given is upon a condition which rests in the discretion and judgment of the courts, and if exercised by the assignee without their prior permission and approval, must be so exercised at his peril and subject to their prohibition or direction at any moment, and upon the application of any person interested or aggrieved, and so does not involve an intent to hinder, delay or defraud the creditors of the assignor. We think the latter view of the instrument discloses its true and intended meaning. Two cases in this court have drawn the line of distinction between the constructions which have been argued. In one of them (*Dunham v. Waterman*, 17 N. Y. 9), the

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assignment gave authority to the assignees to pay such sums "as they may find expedient" in completing unfinished articles, as "in their judgment shall seem most advisable." The assignment was held to be void. The whole point of the decision was that the instrument conferred a discretion upon the assignees which superseded the authority of the courts; a right to judge when and how long to delay, what and how much to expend, with which equity could not interfere; and the question was asked, "if the courts uphold this condition must they not execute it? Can they substitute *their* discretion for that which the owner of the property has vested in his assignees?" The question was answered in the negative and the assignment fell with the answer. To the argument that sometimes the completion of articles in different stages of progress would be so manifestly wise that the courts would permit it, the reply was made that in such case an error "in the exercise of that legal discretion which is incident to the trust" could be corrected by the courts, but not so "in respect to a discretionary power expressly vested" in the assignee by the assignment. The precise point of the adjudication is that where the mode and manner of carrying out the one duty of the trust, to convert and distribute the assigned assets, is placed in the discretion of the assignee and taken away from the supervision of the courts, the assignment is void. The instrument before us does not thus offend as we read its terms. The authority given is not absolute but conditional, and the condition preserves the full control and supervision of the courts, and no inconsistent or superseding discretion is conferred. The words are "should it *be* necessary and to the better performance of the trust." Who is to judge of that necessity or prudence? The condition is not the judgment of the assignee as to whether a fact exists or not, but the existence of the fact itself. It must *be* necessary. It is not enough that the assignee thinks so. Any one interested may challenge the existence of the necessity or the prudence of the delay, and when they do the court has a right to determine whether or not the condition has arisen, and so decide whether the assignee

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may or may not spend a dollar or wait a day, and he is vested with no discretion of his own which can prevent that intervention. And so the case differs at a vital point from the one cited. It comes rather within the doctrine of a later authority. (*Jessup v. Hulse*, 21 N. Y. 168, 170.) The note of that case confines the invalidity discussed to instances "where the trustee would derive an *independent* discretion by force of the deed, if valid, and not by operation of law." In that case the language was to sell, etc., "at such time or times and in such manner as shall be most conducive to the interests of the creditors, and convert the same into money as soon as may be consistent with the interests of such creditors." The court asked who was to judge as to when or how the sale would be most beneficial, and answered, not the assignee, for no power to determine was vested in him. It remained in the courts and their supervision and control was not superseded or destroyed. That is true as we read it of the instrument before us. It confers no discretion to complete unfinished articles. It gives simply the power to do so when necessity or a better performance of the trust as adjudged by the discretion of the court shall require. We are of the opinion that this assignee could not with safety spend money or employ time in completing unfinished articles except under the order of the court, and acting without that order acts at his peril, and may be restrained at any moment, since his sole authority is conditioned upon a necessity of which not he but the court is the sole and ultimate judge. This was the view which must have been taken by the General Term, and we give it our assent.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.

Statement of case.

THE ASSOCIATION FOR THE BENEFIT OF COLORED ORPHANS IN
THE CITY OF NEW YORK, Appellant and Respondent, v.
THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF
NEW YORK, Appellant and Respondent.

The object of plaintiff's incorporation, as expressed in its constitution, made pursuant to its charter (Chap. 232, Laws of 1838), is "to provide and maintain a place of refuge for colored orphans where they shall be boarded and suitably educated." Plaintiff purchased certain real estate in the city of New York, which with the buildings thereon are used for the purpose of its incorporation. By the "House Rules" religious services are required to be held once a day each Sunday and on certain other days specified, but no visitors are allowed to be admitted on Sunday except under pressing circumstances, and with the consent of the superintendent. In an action to have certain taxes imposed upon the land declared void; *held*, that the building upon the land in question was not a "school house," "an incorporated academy or other seminary of learning," or a "building for public worship," within the meaning of the provision of the Revised Statutes in reference to exemptions from taxation (1 R. S. 888, § 4, subd. 3), at least as limited by the provisions of the statute in relation to such exemption in the city of New York (Chap. 232, Laws of 1832; § 827, chap. 410, Laws of 1882), but that it was an "alms-house" within said provision of the Revised Statutes (§ 4, subd. 4, as amended by chap. 136, Laws of 1866), and as such it and the land were exempt from taxation.

Plaintiff took title to the premises by deed dated July 31, 1877; *held*, that as by the general scheme of taxation applicable to said city (now incorporated in chap. 410, Laws of 1882, §§ 814 *et seq.*), the character of real estate for the purposes of taxation is fixed for the year on May 1, and if then assessable it remains so, and there is no power lodged anywhere to take it out of the record book or the roll for that year, the tax was properly laid, and was payable by the plaintiff if it desired to clear its title; and this, without regard to the question as to whether the tax had become a lien when plaintiff took title.

(Argued February 9, 1887; decided March 1, 1887.)

THESE were cross appeals from a judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made January 8, 1886, which affirmed in part and reversed in part a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term. (Reported below 38 Hun, 593.)

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109 592
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118 190
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119 94

104 581
127 12

104 581
149 351

104 581
153 837

Statement of case.

The nature of the action, and the material facts, are set forth in the opinion.

Herbert A. Shipman for plaintiff. Aside from the religious instruction the giving of which is shown to be an important branch of the business of plaintiff, it is certainly a religious association within the meaning of the statute. (*Hebrew Free School v. Mayor, etc.*, 4 Hun, 446.) But even if this association was not a religious association, its property would still be exempt from taxation, for the reason that it is a public incorporated institution of learning. (*Chegaray v. Mayor, etc.*, 13 N. Y. 220; *People ex rel. N. Y. Med. Coll. and Hosp'l for Women v. Campbell*, 93 N. Y. 198.) The buildings of this association come within the terms of the definition of an alms-house. (*Hebrew Orph. Asylum v. Mayor, etc.*, 11 Hun, 118.) No lien or incumbrance is created by tax until after the list containing it is confirmed. (*M. E. Church v. Mayor, etc.*, 20 Hun, 298; *Barlow v. St. Nich. Nat. Bk.*, 63 N. Y. 399; *Fisher v. Mayor, etc.*, 67 id. 77.)

Arthur H. Masten for defendant. The property of orphan asylums is not exempt from taxation under the laws of this State. (1 R. S. [7th ed.] 982; Laws of 1883, chap. 397, § 4; Laws of 1863, chap. 132; Laws of 1866, chap. 647; id. chap. 350; Laws of 1867, chap. 122; Laws of 1868, chaps. 258, 468; Laws of 1871, chaps. 81, 249; Sedgw. on Stat. Constr. [2d ed.] 212; Maxw. on Interp. of Stat. 40; *People ex rel. West. Fire Ins. Co. v. Davenport*, 91 N. Y. 574, 592.) The fact that the religious exercises or services held in plaintiff's building are for the exclusive benefit and enjoyment of the inmates of the institution, is sufficient to show that the premises are not to be regarded as a "place of public worship," within the meaning of the statute. (*Rector, etc. v. Mayor, etc.*, 10 How. Pr. 138; *Bangor v. Masonic Lodge*, 73 Me. 428.) The property of the plaintiff is not exempt as an "alms-house." (Laws of 1867, chap. 951; Laws of 1870, chap. 424; Laws of 1873, chap. 661; Laws of 1875, chap. 140; Laws of 1878, chap. 404; Laws of 1881, chap.

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323.) The settled rules of statutory construction forbid such an interpretation as is required to include the property of the plaintiff within the classes that are exempt from taxation. (*Chegaray v. Mayor, etc.*, 13 N. Y. 220; *N. Y. Med. Coll. & Hosp. for Women v. Campbell*, 93 N. Y. 196; *Buffalo City Cem. v. City of Buffalo*, 46 id. 506; *Roosevelt Hospital v. Mayor, etc.*, 84 N. Y. 108; *People ex rel. Westchester Fire Ins. Co. v. Davenport*, 91 N. Y. 574, 586; *People ex rel. Twenty-third St. R. R. Co. v. Tax Com'rs*, 554, 556, 557.) The property in question was in no event exempt from taxation for the year 1877, because it was not purchased by the plaintiff until July 31, 1877, after the books of annual record had been closed, and the right to claim exemption for that year was gone. (*Clark v. Norton*, 49 N. Y. 243; *Overing v. Foote*, 65 id. 264; *People ex rel. Twenty-third St. R. R. Co. v. Com'rs of Taxes*, 91 id. 593, 602; *McMahon v. Beekman*, 65 How. Pr. 427, 433.)

PECKHAM, J. The plaintiff commenced this action to set aside as a cloud upon its title the lien of certain taxes which the taxing officers of defendant had assumed to levy upon its lands situated in that city and exclusively used by it for the purposes of its incorporation. The taxes were levied from the years 1877 to 1880, both inclusive, and amounted to something over \$2,000. The Special Term granted judgment in favor of the plaintiff and enjoined the collection of the tax for any one of the years mentioned.

Upon appeal to the General Term that court affirmed the judgment as to all the years but 1877, and held that the plaintiff purchased its land in that year subject to the lien of the tax and therefore modified the judgment of the Special Term as to that year. Both parties appealed from that order, and the whole question is now before this court for review. The plaintiff claims that its property is exempt from taxation by virtue of the general laws of the State. The court below placed its decision on two grounds, first that the facts showed that the building in question upon the property of the plain-

tiff was a school-house, and second that it was a building for public worship.

The plaintiff was incorporated as a colored orphan asylum by chapter 232 of the laws of 1838. Its charter was subsequently amended, but not in any matter material to this investigation. The act of incorporation did not specify the purpose for which the corporation was formed any further than such purpose might be assumed from the name, but it did make the corporation subject to the provisions of and it gave to it the powers possessed by a corporation under the Revised Statutes (1 R. S. 600, § 1), and the sixth subdivision of that section gave the corporation power to make by-laws for the regulation of its affairs.

There was put in evidence on the trial a copy of the constitution of the plaintiff made pursuant to this power to make by-laws, and by article two it was declared that "the object of this society shall be to provide and maintain a place of refuge for colored orphans where they shall be boarded and suitably educated until of an age to be bound or apprenticed. In admitting children to the asylum those deprived of both parents shall have the preference, but if means be afforded, half orphans shall be received."

Judging from its act of incorporation and the provisions of its constitution we are by no means satisfied that it comes under either head of exemption as stated by the court below. This court has decided that the "school house" referred to in our statute of exemption (1 R. S. 388, § 4, sub. 3), is the public common school. (*Chegaray v. Mayor, etc.*, 13 N. Y. 220.) The dictum of RUGGLES, Ch., J., to the contrary, in *Chegaray v. Jenkins* (5 N. Y. 376), being overruled by the court. It is difficult to see also how this can be said to be a building for public worship within the same statute.

The house rules provide that the Sabbath religious services shall be held in the assembly room at eleven A. M., * * * and appropriate services on Thanksgiving and national fasts at such hour as the superintendent may designate. But it is also expressly provided that "no visitors are to be

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admitted on that day (Sunday), either to the children or other inmates, except under pressing and peculiar circumstances and by consent of the superintendent or matron."

How can that worship be called public to which the public is not admitted? On the contrary, it is obviously conducted as a proper religious service for the inmates of the institution only, and who are by statute made the wards of the trustees, who are thereby constituted their guardians.

Again, by the act (chap. 282, Laws of 1852), repeated substantially in section 827 of chapter 410, of the Laws of 1882 (New York consolidation act), the building for public worship to be exempt must, in New York city at least, be exclusively used for that purpose and also be the property of a religious society. It is not pretended that it is thus exclusively used. Nor can it be successfully contended that the plaintiff is brought within the meaning of the statute as being either "an incorporated academy or other seminary of learning" by the very limited provision that is made for suitably educating these orphan children until they are of an age to be bound out or apprenticed. At any rate the building is not exclusively used for the purpose of a seminary of learning, nor is that its prime or chief purpose. Protection and care, a place of refuge for colored orphans, are the main purposes, and the comparatively small amount of education comes in as an addendum to such charity.

The case of *Hebrew Free School Association v. Mayor, etc.* (4 Hun, 446), is not in point. In that case there was and could be no question but that the corporation was a seminary of learning within the general exemption statute, and the only issue raised was whether the building was the exclusive property of a religious society. The object of the corporation was to provide for the gratuitous instruction of Jewish youth in the Hebrew religion and language and other branches of knowledge and promote the study of Hebrew literature. The court held it answered sufficiently the designation of a religious society within the meaning of the act of 1852 to entitle its building to exemption. But in this case the plaintiff is not

brought within the general statute of exemption upon any of the grounds already discussed.

We think, however, its claim can very fairly rest upon another subdivision of the same statute. By subdivision 4 of section 4, already cited (as amended by chap. 136, of the Laws of 1866), it is provided that "every poor-house, alms-house, house of industry and every house belonging to a company incorporated for the reformation of offenders, or to improve the moral condition of seamen and the real and personal property used for such purposes belonging to or connected with the same," shall be exempt from taxation. At first it might be thought (and it has been claimed), that this statute refers to such alms-houses as are the property of the public and are used and controlled by public authorities as the receptacles of public paupers in accordance with the general system of the poor laws of our State. This kind of claim was made in the case of the *Swiss Benevolent Society* in the precise language above used, and in that case, reported in the Daily Register, September 12, 1885, the New York General Term held that the argument was not sound, and for reasons which we think are entirely valid.

In the first place it may be observed that there is no occasion for so narrow a construction of the statute arising from the language used. The statute in terms includes property other than such as is owned by the public, as it includes any corporation incorporated for the reformation of offenders, or to improve the moral condition of seamen, both of which may be private corporations, and so, too, an alms-house may be a private corporation. The building of the plaintiff comes within the fair meaning of an alms-house which is defined as a house appropriated for the poor. This, certainly, is the case with the building of the plaintiff. It is appropriated wholly for the poor who are colored orphans, and where they are to have a place of refuge and to be boarded, clothed and suitably educated, etc., gratuitously. What seems a still stronger reason for denying the correctness of the claim that the statute refers only to the well known public

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alms-houses is the fact that in treating of the general subject of the support of the poor, the legislature (1 R. S. 614), by a special section (p. 631, § 72), made this provision for the public alms-houses just spoken of: "Every poor-house, alms-house, or other place provided by any city, town or county for the reception and support of the poor, and all real and personal property whatever, belonging to or connected with the same, shall be exempt from all assessment and taxation," etc. This is simply a substantial repetition of the act of 1826, chapter 10, which made it unlawful "to assess any city, county or town poor-house or alms-house," and, like that act, it strictly confines the exemption to public alms-houses and would, therefore, exclude a building devoted to such purposes as that owned by the plaintiff. But when the general statute relating to exemptions is passed as part of the Revised Statutes, it is seen how much broader the language is than was used in the act of 1826. In providing for the general support of the poor, a subsequent part of the Revised Statutes re-enacts (as above quoted) the substance of the act of 1826, with additions as to the keeper of such poor-houses. It may be thought that this subsequent enactment was unnecessary because the public alms-houses were certainly included in the general exemption statute. However that may be, it does not detract from the strength of the argument that when the legislature first passed an enactment regarding alms-houses it did so in such language as included only public institutions, and when it passed in the Revised Statutes a general enactment as to exemptions it adopted language showing an intention to greatly broaden the exemption. If its intentions had been the same in the passage of the two provisions embodied in the Revised Statutes and already quoted, it is not too much to say that it would have adopted the same language, or language of like import, and in regard to which there would be no room for doubt or misapprehension. The general principle that statutes of exemption should be strictly construed, we believe in and adhere to, but such a case as this we do not regard as coming within that principle. The

plaintiff is performing a work of pure charity and is taking upon its own shoulders a portion of the burden that would otherwise fall upon the public. It is doing this good work by the express permission of the legislature, and through its aid, by reason of its incorporation, and in the language of Mr. Justice DAVIS, in the case of *The Swiss Benevolent Society*, above cited, the legislature "cannot intend to tax the means by which the relator performs the duty" for which it was incorporated, "that of taking a portion of a public burden upon its own shoulders."

Such a case as this is wholly outside of the mischief intended to be prevented by the rule referred to. When business corporations or interests come to the courts seeking an exemption from the common burden of taxation, it behooves them to show plainly the law which grants the exemption claimed, and the courts will scrutinize it with great care and caution before allowing such claim.

We think the property comes fairly within the meaning of the statute as an almshouse, and that it was exempt on that ground from taxation.

The remaining question relates to the tax of the year 1877, which the General Term held the plaintiff liable to pay. The plaintiff took title to the premises by deed dated July 31, 1877, and it is now contended that there was no lien arising from the imposition of any tax until the amount of the tax was carried out and the same was confirmed, which in this instance did not, as is said, take place until October, 1877.

In questions arising under covenants in deeds as to incumbrances, it has been decided that no lien or incumbrance by reason of a tax existed until the amount thereof was ascertained or determined. (*Dowdney v. Mayor, etc*, 54 N. Y. 186.)

A different principal, however, is here involved. The counsel for plaintiff says, that when the assessors valued the property in question for the purpose of taxation, it was legally liable to taxation, and the action of the commissioners in assessing it was undoubtedly correct, but he claims that the

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tax was illegally confirmed, as at that date it belonged to plaintiff and was exempt. We do not think this is the case.

The court at Special Term found that in 1877 a tax of \$524.70 was levied on the premises in question by the defendant. This tax arose from the tax proceedings which were initiated in September of the year 1876. By section 814, and following sections of the consolidation act of New York (Chap. 410, Laws of 1882), the deputy tax commissioners commenced to assess real and personal estate on the first Monday of September in each year. They furnish to the commissioners of taxes and assessments, under oath, a detailed statement of all the taxable property in their several districts. From these returns the commissioners make up certain books called "the annual record of the assessed valuation of real and personal estate." These books are open for examination and correction from the second Monday in January until the first day of May in each year, on which last named day they are closed to enable the commissioners to prepare assessment-rolls of the several wards for delivery to the aldermen.

On the first day of May the commissioners must cause to be prepared from these books of annual record, and which are declared by law to be closed on that day, assessment-rolls for each ward, and must annex to them a certificate that the same are correct, in accordance with the entries in said books of record. These rolls, thus certified, must be delivered by the commissioners to the board of aldermen on the first Monday in July in each year. These rolls are then taken by the board which, after examination and figuring, carries out the amount of the tax, having in the meantime arrived at the determination of the gross amount to be raised by taxation for the year, and the assessment-rolls must be delivered, with the proper warrants from the board of aldermen attached, to the receiver of taxes on or before the first day of September, who then gives notice and proceeds to collect the taxes.

From this review of the law it is seen that the initial steps to levy a tax commence in September of one year and are not

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concluded by the receipt of the tax warrants by the receiver of taxes until the September following, covering a whole year in the process. Even if real estate not on the annual record of assessed valuation at the time when the books are open for examination could be placed on, or if real estate that is on could be taken from the record up to the time of the closing thereof in the following May, it is clear that no such alteration could be made after that date, and it is equally clear that the general scheme of taxation is to enter as assessable that property which is of that character up to the time when the record book is open for examination. If then assessable, its character would seem to be fixed for the year, but in any event, if assessable and assessed at the time the books close it must remain so for purposes of taxation under the assessment-roll that is to be compiled from the record for that year. There is no power anywhere after that to take real estate out of that record and out of the roll, because since the closing of the record the property has passed into the hands of an institution exempt from taxation. The exemption must be held in such a case as this to be prospective in its operation. There is no provision made for any amendment or alteration of the record after the first day of May in regard to the assessment of property (with an exception that does not touch this case, § 820), and all subsequent proceedings are based upon the absolute stability of the record from that date, and the assessment-rolls are to be correct and certified transcripts of the same. Upon this basis the taxes are carried out by the aldermen and the rolls with the proper warrants annexed are delivered to the receiver of taxes, and thus at no period of time intermediate the closing of the books on the first of May and the reception of the assessment-rolls and the warrants annexed thereto by the receiver, could any one legally drop this property from the assessment-rol. Whether or not the tax had become a lien at the time when the plaintiff took title is a fact of no moment. It may be conceded that technically there was then no lien. For the reasons already given the property was nevertheless rightly on the roll and could not be legally

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taken off, and the tax was properly laid and was payable by the plaintiff if it desired to clear its title to the property.

The judgment of the General Term, modifying the judgment of the Special Term, should be affirmed, and as both parties appealed from it and both have failed, neither should recover costs as against the other.

All concur.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
CHARLES J. EVERHARDT, Appellant.

The provision of the Code of Criminal Procedure (§ 399), requiring corroboration of the testimony of an accomplice is complied with, if there is some other evidence fairly tending to connect the defendant with the commission of the crime charged, so that the conviction will not rest entirely upon the evidence of the accomplice. The question as to whether the evidence is sufficient corroboration is for the determination of a jury.

Upon the trial of an indictment for forgery; the charge being that defendant knowingly uttered a forged check. *Held*, that on the question of guilty knowledge it was competent to prove the uttering by him of other forged checks upon other occasions.

The defendant was described in the indictment by various names. Upon the trial defendant's counsel gave his true name, and requested that in administering oaths on the trial, the clerk should designate him by this name omitting the fictitious names. The court replied that it would instruct the clerk to designate defendant by the name so given, and would allow him to state the other names contained in the indictment, and in administering oaths, the clerk gave all the names, to which said counsel excepted. It appeared from the examination of some of the jurors, that they were prejudiced by the fact that he seemed to have so many different names; these were excluded from the jury. *Held*, that while the fictitious names might have been omitted after the true name was discovered, no material error was committed by the repetition of them.

After the rendition of a verdict of guilty, at the request of defendant's counsel, the defendant was remanded until a day named for the purpose of a motion for arrest of judgment and for a new trial; no motion was made by either party on the day named or during the term.

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162	531

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168	*341

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attorney moved for judgment, which was opposed on the ground that the court had no jurisdiction. *Held*, untenable; that it was fairly to be assumed that defendant, by not appearing, or offering to appear, on the day named, and by not objecting, waived the delay within the meaning of and as authorized by the provision of the Code of Criminal Procedure (§ 473), in reference to the time of pronouncing judgment after a verdict of guilty.

(Argued February 10, 1887; decided March 1, 1887.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made January 4, 1887, which affirmed a judgment of the Court of General Sessions, in and for the city and county of New York, entered upon a verdict convicting defendant of the crime of forgery in the second degree.

The material facts are stated in the opinion.

A. Suydam for appellant. The corroboration of the accomplice was wholly insufficient. The additional evidence did not "tend to connect the defendant with the commission of the crime." (Code of Crim. Pro., 399; *People v. Courtney*, 28 Hun, 589; *People v. Plath*, 100 N. Y. 593.) All the evidence in regard to the uttering of other forged checks was improperly admitted. (*Stokes v. People*, 53 N. Y. 164, 170; *Rosenzweig v. People*, 6 Lans. 462; *Coleman v. People*, 55 N. Y. 81, 90, 91; *Copperman v. People*, 56 id. 592; *People v. Gibbs*, 93 id. 470, 473; *People v. Baker*, 96 id. 340.) It is contended, on behalf of the appellant, that, according to common law rules, and by the clear interpretation of the provisions of the Code of Criminal Procedure, judgment in a criminal action must be rendered at the same term at which the action was tried, unless there is a reason for delay arising out of some proceeding between verdict and judgment, and that such reason must appear on the record. (Code of Crim. Pro., §§ 471, 472, 483; *Rex v. Fletcher*, Russ & Ry. 58; *Brown v. Rice*, 57 Me. 55; *Com'rs v. Maloy*, 57 Penn. St. 291; *Ex parte Lange*, 18 Wall. 163, 174; *Lowenberg v. People*, 27 N. Y. 336.) The repetition

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of the alias names in the hearing of the jury against the objection of the defendant was error and affected his substantial rights. (*Hildreth v. City of Troy*, 101 N. Y. 234, Code of Civ. Pro., § 387.)

McKenzie Sample for respondent. If a defendant is indicted by a fictitious or erroneous name, and in any stage of the proceedings his true name is discovered it may be inserted in the subsequent proceedings, referring to the fact of his being indicted by the name mentioned in the indictment. (Code Crim. Pro., § 277; Thompson & Merriam on Juries, 228, 229, § 259; *Grisson v. State*, 8 Tex. App., 370, 378; *Atlas Co. v. Johnson*, 23 Mich. 37.) The exclusion by the court of a talesman is not reviewable on appeal. (Crim. Code, §§ 445, 485, 527.) The evidence relied on, as corroborative of the accomplice and tending to prove defendant's complicity in the perpetration of the crime, was sufficient. (*People v. Ryland*, 97 N. Y. 126; 28 Hun, 589; 1 N. Y. Cr. R. 123.) Special intention to defraud was one of the constituent elements of the crime charged and was, therefore, as doubtful (in the sense that it was in issue) as any of the other constituent elements of the crime, proof of other previous forgeries was admissible. (*People v. Whyland*, 4 Hun, 511; *People v. Shulman*, 80 N. Y. 373; *Mayer v. People*, id. 364.) Even if the delay cannot be deemed to have been waived by the defendant, and if the rendering of judgments after the expiration of the term at which the defendant was tried and convicted can be deemed a departure from the mode of procedure prescribed by the Code, or an error or mistake therein, it is not such a departure, error or mistake as renders the judgment invalid or furnishes ground for reversal, for it did not actually prejudice the defendant, or tend to his prejudice, in respect to a substantial right. (Code of Crim. Pro., § 684.) Such error or mistake was not available on motion in arrest of judgment, which motion must be founded upon some one of the "defects in the indictment in section 331." (Code Crim. Pro., § 467.)

Opinion of the Court, per EARL, J.

EARL, J. The defendant was convicted in the Court of General Sessions in the city of New York of the crime of forgery in the second degree, committed by uttering a forged check knowing it to be forged.

Prior to his conviction, one Gaylord had been convicted of the same offense for uttering the same check, and had been sentenced to the State prison at Sing Sing. He was produced as a witness on the trial of the defendant and testified that he received the forged check from him and was induced by him to attempt to obtain the money upon it from the bank upon which it was drawn. He was therefore an accomplice, and the objection is now made that his testimony was not sufficiently corroborated under section 399 of the Code of Criminal Procedure, which provides that "a conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime." Prior to the enactment of this section it was customary for judges to instruct jurors that they should not convict a defendant of crime upon the evidence of an accomplice unless such evidence was corroborated; and yet it was the law in this State that a defendant could be convicted upon the uncorroborated evidence of an accomplice if the jury believed it. This section has changed that rule of law and requires that there should be simply corroborative evidence, which tends to connect the defendant with the commission of the crime.

Here, without referring particularly to the evidence of Schulken and of Caroline Gaylord, we think such evidence was sufficient to show some active agency on the part of the defendant in uttering the check, and thus to connect him with the commission of the crime, and that satisfies the law. Whether that evidence was sufficient corroboration of the accomplice was for the determination of the jury. The law is complied with if there is some other evidence fairly tending to connect the defendant with the commission of the crime so that his conviction will not rest entirely upon the evidence of the accomplice.

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Upon the trial, the people were allowed to prove against the objection of the defendant, the uttering of other forged checks by him upon other occasions. In this there was no error. The defendant by his plea of not guilty had put in issue everything which it was incumbent upon the people to prove. They had no direct or positive evidence that he personally forged the check which he uttered, and it was open for him to show that at the time he uttered it he had no knowledge that it was forged, and was therefore innocent of crime; and for the purpose of showing the prisoner's guilty knowledge in such cases it has always been held competent to prove other forgeries. (*Mayer v. People*, 80 N. Y. 364; *People v. Shulman*, id 373.) Such proof is not received for the purpose of showing other crimes than that charged in the indictment, but for the purpose of showing the guilty knowledge and intent which are elements of the crime charged, and it can be considered by the jury only for that purpose. Although the evidence of Gaylord, corroborated as it was, as to the guilty knowledge of the defendant, was quite clear and convincing, yet the people were not bound to rest upon a *prima facie* case, but had the right to confirm that evidence by the proof as to the uttering of other forged checks.

The defendant was described in the indictment as "George Hartman, otherwise called George Peters, otherwise called Mash Market Jake, otherwise called Charles Coke; otherwise called Charles McGloin." Upon the trial, these names were repeated by the clerk in the oath administered to the jurors challenged, and the counsel for the defendant objected to the repetition of such names on the ground that it tended to prejudice the defendant in the minds of the jurors; and he admitted and offered to prove that the true name of the defendant was Charles Everhardt. The trial judge stated in reply that he could see no objection to the clerk inserting in the subsequent proceedings the name which the defendant asserted was his true name, and referring to the fact that he was indicted under another name. The defendant's counsel

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excepted and again asked the court to instruct the clerk, in swearing the jurors and the witnesses, that he should designate the defendant as Charles J. Everhardt, and omit the fictitious names. The court replied that he would instruct the clerk to designate the defendant as Charles J. Everhardt, and would allow him to state the several other names. To this ruling the defendant's counsel excepted. Thereafter, throughout the trial, at each administration of an oath the clerk, under the instructions of the court, designated the defendant as "Charles J. Everhardt, indicted as George Hartman, otherwise called George Peters, otherwise called Mash Market Jake, otherwise called Charles Coke, otherwise called Charles McGloyn." At each repetition of these names defendant's counsel objected thereto and moved that the defendant be designated by the name of Charles J. Everhardt, and not by the fictitious names. The objections were overruled and the motion denied and defendant's counsel excepted. It appeared from the examination of some of the jurors that they were prejudiced by the fact that the defendant appeared to have so many different names, and they were excluded from the jury on that account, and twelve jurors were finally empaneled against whom there was no objection. Section 277 of the Code of Criminal Procedure provides that "if the defendant is indicted by a fictitious or erroneous name and in any stage of the proceeding his true name is discovered, it may be included in the subsequent proceedings referring to the fact of his being indicted by the name mentioned in the indictment." No material error was committed by the repetition of the fictitious names. While undoubtedly they might with propriety have been omitted in the administration of the oath to jurors and witnesses after the true name was discovered and inserted in the indictment and other proceedings, yet as such names all appeared in the indictment and in the evidence it was not error to repeat them whenever it became necessary to name the defendant, and it cannot be assumed that any legal harm was thereby done to him.

After the jury returned their verdict of guilty, the counsel

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for the defendant requested that the defendant be remanded until the Tuesday following, which was the twenty-second day of December, that he might then make a motion for arrest of judgment, and for a new trial, and the court granted the request and ordered that the prisoner should be remanded until that day. The record then states that no further proceedings were had and no motion was made by either party during the December Term of the court; that afterward, on the 24th day of December, 1885, the December Term of the court was finally adjourned without day; that afterward, on the 7th day of January, 1886, at the January Term of the court, the same judge presiding, the following proceedings were had: The defendant being again led to the bar of the court, the district attorney moved for judgment, and the defendant being asked if he had any cause to say why judgment should not be pronounced against him, his counsel moved for a new trial upon various grounds mentioned, being for errors committed during the progress of the trial. He also moved that judgment should be arrested because, among other things, "the verdict was rendered and the jury discharged on the 18th day of December, 1885, and during the December Term of the court; and afterward, to wit, on the 24th day of December, 1885, the court was duly adjourned until the next term, by which adjournment the December Term was finally adjourned without day, no judgment having been rendered, and the defendant not having applied for or consented to any delay in the rendition of judgment beyond the 22d day of December, 1885, being the Tuesday following next after the day on which the verdict was rendered, and the court now holding the January Term, 1886, has no jurisdiction to render judgment in the action." The court which pronounced the judgment was the same court which tried the indictment, and in which the verdict was rendered, and it would be a sufficient answer in this case that no substantial harm was done to the defendant by the delay from the twenty-second day of December to the seventh day of January following. But upon this record, it may fairly be said that

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the defendant, not objecting, waived any delay within the meaning of section 472 of the Code of Criminal Procedure, which provides that the time for pronouncing judgment after a verdict of guilty "must be at least two days after the verdict, if the court intend to remain in session so long, or if not, as remote a time as can reasonably be allowed; but any delay may be waived by the defendant." Judgment in this case was postponed at the request of the defendant until the twenty-second day of December, to enable his counsel to make a motion for arrest of judgment and for a new trial. On that day he did not appear or request to appear in court to make his motion, and hence he must be assumed to have been wholly indifferent to the delay and to have consented thereto. There is, therefore, no reason for saying that the court lost jurisdiction to pronounce judgment on a subsequent day.

We have now noticed briefly all the allegations of error brought to our attention by the counsel for the defendant, and believe that none of them are well founded.

The judgment should be affirmed.

All concur.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
ANDREW J. WIGHTMAN, Appellant.

To sustain a conviction under the Penal Code (§ 553), for sending a threatening letter, it is not essential that the threat on its face be to do an illegal act. An accusation in writing of an act involving moral turpitude, known by the writer to be false, accompanied with a suggestion that legal proceedings will be taken, unless the person against whom it is made purchase silence, may be a threat within the statute, although, in form, the accused is only called upon to render satisfaction for that which, if the charge was true, would entitle the accuser to pecuniary compensation.

An indictment charged, in substance, and the evidence justified a finding that defendant and others, with intent to extort money from the prose-

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cutor, sent to him a letter, well knowing its contents, falsely accusing him of having had sexual intercourse with M., an unmarried female, resulting in pregnancy. The letter was set forth in the indictment, it purported to have been written by one of the accused, an attorney, and was addressed to the prosecutor. It alleged that the writer had been informed by M. of the fact of such intercourse and its results, and after referring to the liability in such case for the support of the child and the mother's expenses during her sickness, concluded thus, "are you willing to make suitable provision for such liability and thereby avoid publicity, or will it be necessary to take legal steps in the matter." *Held*, that the indictment was good in substance, and the evidence justified a conviction.

(Submitted February 10, 1887; decided March 1, 1887.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made January 22, 1887, which affirmed a judgment of the Court of Oyer and Terminer in and for the city and county of New York, entered upon a verdict convicting the defendant of the crime of blackmail.

The material facts are stated in the opinion.

T. W. Tyng for appellant. To convict a defendant of this crime it is necessary to aver and prove that the letter or writing threatened to do one or the other of the four acts specified in section 558 of the Penal Code; that the defendant knew the contents of the letter or writing; that he sent it, or caused it to be forwarded or received, with the intent by means thereof to extort or gain money. Everything else is surplusage. (*People v. Thompson*, 97 N. Y. 313.) If the record be found ambiguous, the construction most favorable to the appellant should be given. (*Bonnell v. Griswold*, 89 N. Y. 122.) An indictment can charge but one crime and in one form, except as provided in section 279; and this section only allows different crimes to be charged in the same indictment when they are founded upon the same acts. (Code Crim. Pro., § 278.)

McKenzie Sample for respondent. If an indictment alleges that a letter, whose language as set forth was meant to convey

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a particular threat, the indictment must be deemed good pleading and the question as to whether the letter does or does not convey the alleged threat cannot be decided upon demurrer, but must be referred to the jury. (*People v. Thompson*, 97 N. Y. 313; *Reg. v. Hendy*, 4 Cox Cr. Cas. 243; *Reg. v. Smith*, 2 Carr. & Kir. [61 E. C. L. R.] 882; *Res. v. Tucker*, 1 Moody, 134; *Reg. v. Cooper*, 3 Cox Cr. Cas. 547; Bishop's Crim. Pro., §§ 1228, 1229; Wharton on Crim. Law, § 1665; Deste's Crim. Law, § 142 J, notes 13, 14.) Whether a letter is a threatening letter is a question of fact for the jury. (*Reg. v. Hendy*, 4 Cox Cr. Cas. 243; *Reg. v. Smith*, 2 Carr. & Kir. [61 E. C. L. R.] 882; *Res. v. Tucker*, 1 Moody, 134; *Reg. v. Cooper*, 3 Cox Cr. Cas. 547.)

ANDREWS, J. Omitting the superfluous words in the indictment, it charges, among other things, in substance, that the defendant and others, well knowing the contents of the letter and with intent to extort money from the prosecutor, did, on a day and at a place mentioned in the indictment, feloniously send and cause to be forwarded to, and received by the prosecutor, the letter set out in the indictment, threatening to expose him to disgrace by falsely and publicly accusing him of having had sexual intercourse with one May A. Thatcher, an unmarried female, resulting in her pregnancy of a child likely to be born a bastard. The letter set out in the indictment purports to have been written by one of the co-defendants, an attorney-at-law, in behalf of May A. Thatcher, and was addressed to the prosecutor. The letter, after stating that the writer had been informed by May A. Thatcher that there had been sexual intercourse between her and the prosecutor and that she was with child by him, proceeds as follows: "I suppose you are aware that under these conditions you are liable for the support of the child and the mother's expenses during her sickness. Are you willing to make suitable provision for such liability and thereby avoid publicity, or will it

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be necessary to take legal steps in the matter." The defendant was tried and convicted. The evidence is not contained in the record. The bill of exceptions states that the people, to maintain the issue on their part, introduced evidence tending to prove the acts charged in the first five counts of the indictment. It must be assumed, therefore, that the evidence justified the jury in finding that the defendant knowingly sent a letter to the prosecutor, falsely charging him with having had illicit intercourse with May A. Thatcher, resulting in pregnancy, and that it was sent for the purpose of extortion. It is claimed on behalf of the defendant, that, to support a conviction under section 558 of the Penal Code, for sending a threatening letter, the letter complained of must not only in itself contain a threat, but it must on its face be a threat to do an illegal thing. It is doubtless true that a demand for indemnity for a wrong, made in good faith, accompanied by a suggestion that legal proceedings will be resorted to unless satisfaction is voluntarily made, is not a threat within the statute, although the wrong is one the disclosure of which would bring disgrace upon the guilty party. But if the party making the demand knows that he has suffered no wrong, a threat to prosecute, unless settlement is made, might, we conceive, bring the case within the statute, although on the face of the letter the party writing it might seem to be asserting only his legal rights. In other words, a false accusation in writing of an act involving moral turpitude, known by the party making it to be false, accompanied with a suggestion that legal proceedings will be taken unless the person against whom it is made purchases silence, may be a threat within the statute, although in form the accused is simply called upon to render satisfaction for that which, if the charge was true, would entitle the accuser to pecuniary compensation. The mere form in which the threat is made is not decisive. The letter in this case distinctly intimated that legal proceedings would be taken to enforce the liability unless the prosecutor made voluntary provision for the mother and child, and he is asked whether he is willing to do this to *avoid*

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publicity. The averment in the indictment that the defendant, for the purpose of extorting money from the prosecutor, threatened to expose him to disgrace by falsely charging him with the criminal acts stated, fairly implies that defendant knew the charge contained in the letter was false, and the admission in the record that evidence was given tending to prove the acts charged in the indictment must have been intended to cover not merely the bare act of sending the letter, but the circumstances averred in connection with the act, that is that it was a scheme to extort money by making a false charge.

We think the indictment was good in substance, and that the conviction should be affirmed. (See *People v. Thompson*, 97 N. Y. 313; *Reg. v. Hendy*, 4 Cox Cr. C. 243; *Rex v. Tucker*, 1 Moody, 134.)

All concur.

Judgment affirmed.

104	602
115	304
104	602
126	59

ISAAC HAYS, Respondent, v. BERNARD MIDAS, Appellant.

Where a vendor brought an action to recover the price of goods sold, and obtained an attachment therein, on the ground that the defendant had removed and disposed of his property with intent to defraud his creditors, which was levied on property of the defendant, but nothing was obtained by plaintiff under the attachment, and said action was subsequently discontinued, by order of the court, on notice to the defendant; *held*, that plaintiff was not precluded thereby from rescinding the sale, on the ground that it was induced by fraud on the part of the vendee, and from bringing an action to recover the goods sold, in the absence of proof that the vendor brought the first action with knowledge of the fraud.

(Argued February 10, 1887; decided March 1, 1887.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made February 13, 1886, which reversed a judgment in favor of defendant entered upon a verdict and directed judgment in favor of plaintiff. (Reported below, 39 Hun, 460.)

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The nature of the action and the material facts are stated in the opinion.

James Troy for appellants. With plaintiff's knowledge of the fraud practiced upon him by Midas, his action to recover the price of the goods was an election to affirm the sale and allow the vendee to retain the property, and he thus secured the benefit of a warrant of attachment which he could not have procured had he elected to disaffirm the contract and reclaim the goods. (Art. 1, tit. 2, chap. 14 Code of Civ. Pro., § 635.) Having elected to pursue one of two inconsistent remedies, his right to the other was extinguished and could not afterwards be resorted to. (*Powers v. Benedict*, 88 N. Y. 609; *Bk. of Beloit v. Beale*, 34 id. 473; *Field v. Bland*, 81 id. 239; *Moller v. Tuska*, 87 id. 166; *Taussig v. Hunt*, 49 id. 301; *Rodermund v. Clark*, 46 id. 354; *Morris v. Rexford*, 18 id. 522; *Bowen v. Mandeville*, 95 id. 239, 240; *Shaffer v. Deitz*, 35 id. 300; *Wile v. Brownstein*, 35 Hun, 68; *Northampton Nat. Bk. v. Kidder*, 50 N. Y. Sup. Ct. [18 J. & S.] 246; *Creighton v. Haggerty*, id. 9; *Wile v. Pierce*, 4 Hun, 351; *Acer v. Hotchkiss*, 97 N. Y. 406; *Strong v. Strong*, 102 id. 69.) The right to rescind a contract for fraud, must be exercised immediately upon its discovery, and any delay in doing so, or the continued employment, use and occupation of the property received under the contract will be deemed an election to affirm it. (*Strong v. Strong*, 102 N. Y. 69.) One cannot experiment upon a contract void for fraud by trying to enforce it with knowledge of the fraud, and that result being unsatisfactory seek at last to rescind it. (*Acer v. Hotchkiss*, 97 N. Y. 395.)

A. Blumenstiel for respondent. Even if there was a conclusive election as between the plaintiff and the defendant Midas, such defense was not available to the sheriff. (*Powers v. Benedict*, 88 N. Y. 609, 610.) There was no binding election. (*Eq. Co-operative F. Co. v. Hersee*, 24 Week. Dig. 428; *Bowe v. Mandeville*, 95 N. Y. 240, 241; *Mallage v. Poole*, 14 Hun, 556, 558; *Johnson v. Field*, 33 id. 195; *Eq.*

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Found. Co. v. Hersee, 33 id. 171, 174, 175, 176; *Nason v. Cochroff*, 3 Duer, 369; *Acer v. Hotchkiss*, 97 N. Y. 395; *Rodermund v. Clark*, 46 id. 354, 356, 357; *Morris v. Resford*, 18 id. 552, 556; *Bk. of Beloit v. Beale*, 34 id. 473.)

DANFORTH, J. This is an appeal by the defendant Stegman from an order of the General Term of the Supreme Court, reversing a judgment theretofore obtained by him in an action for the recovery of personal property and directing judgment in favor of the plaintiff. The complaint contains the usual allegations required in such actions. The answer of defendant Stegman admitted the value of the goods to be as stated, but denied all other averments of the complaint, and set up that as sheriff of Kings county he took the property by virtue of sundry attachments duly issued to him for enforcement against the property of one Midas, his co-defendant, and that one of the attachments was in favor of the plaintiff Hays. Midas, by his answer, alleged that the property was purchased by him from the plaintiff, and that before the commencement of this action the plaintiff sued for the price and obtained a warrant of attachment thereby, as is asserted, affirming the contract of sale.

Upon the trial the plaintiff offered testimony tending to show that Midas procured the goods fraudulently, and produced, and offered to return to him, the notes given therefor. They were refused. The defendant Stegman then put in evidence, among others, the attachment issued to him in favor of the plaintiff. It recited a cause of action on contract, and stated as ground for the attachment that "the defendant has removed and disposed of his property with intent to defraud his creditors," and also the affidavits on which the charge was founded.

The suit was commenced and the attachment levied upon real and personal property of the defendant Midas, on the 16th of December, 1884. But it was proven that the attachment suit was discontinued by an order of the court, made December twenty-seventh, on notice to the defendant,

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and the present action commenced on the 29th of December, 1884. It was conceded that nothing was obtained by the plaintiff under the attachment.

The defendants thereupon moved for a dismissal of the complaint upon the ground, as stated by their counsel, that it appeared from the proof that the plaintiff, on the 16th day of December, 1884, with full knowledge of the fraud which had been perpetrated upon him by Midas, and the right to rescind said sale and reclaim said goods, or affirm the sale and recover the value therefor, had elected to affirm the sale of the goods obtained by Midas, and sue upon the contract for the value thereof, and having so elected and obtained the benefit of a personal remedy, such election was final and conclusive and vested Midas with the title to said property.

By consent of parties the court reserved its decision upon the question of law thus raised, and submitted the case to the jury to find on the question of fact as to whether the defendant Midas had obtained possession of the goods fraudulently, and with the preconceived intent not to pay therefor. They found for the plaintiff.

The court subsequently decided the point reserved, in favor of the defendant, set aside the verdict, dismissed the complaint and awarded judgment in favor of the defendant Stegman for a return of the property. Upon appeal by the plaintiff the General Term reversed this judgment and ordered judgment for the plaintiff upon the verdict.

The two actions are inconsistent, and if it had appeared that the first was brought with knowledge of the defendants' fraud, it may be inferred from the opinions of the courts below there would have been no difference between them. But neither party requested to have that question determined by the jury, and the affidavits which accompanied the attachment have led to a conflict of interpretation. The appellant now contends that the affidavits show not only fraud on the part of Midas in the disposition of his property, but also that he had contracted the debt fraudulently. Such was the conclusion of the trial judge, but we agree with the General Term in the opinion that the latter chargedoes notappear. The

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plaintiff's own affidavit contains no such averment, but alleges as the only ground upon which he applies for an attachment "that the defendant" therein "has removed and disposed of his property with intent to defraud his creditors." The warrant of attachment contains the same and no other charge. Other affidavits state facts which sustain the charge actually made, but unless it is necessarily, and as matter of law, to be inferred that one who is guilty of fraudulently disposing of property was also guilty of fraud in its acquisition, knowledge of the fact cannot be imputed to a person who has no other means of information. It would be different if it appeared that one buying on credit did at the time of purchase intend to make a fraudulent assignment, or other fraudulent disposition of the goods bought, and a vendor who, with knowledge of that fact, sued for the price, might with some reason be deemed to affirm the contract, and thereafter be held to his election.

Such is not this case, nor did any advantage accrue by reason of the attachment. It was a remedy given for another fraud and was incident to the action upon contract, and fell with its discontinuance. The judgment appealed from is so directly within our decision in *Equitable Co-operative Foundry Company v. Hersee* (decided October, 1886, 103 N. Y. 25), that no further discussion is required.

The judgment should be affirmed.

All concur, except EARL, J., not voting.

Judgment affirmed.

104	606
109	686
104	606
120	5
104	606
127	289
104	606
132	402
104	606
145	226

GEORGE H. RICHARDSON et al., Appellants, v. HORACE K. THURBER, as Assignee, etc., Respondent.

Under the provision of the act in relation to assignments for the benefit of creditors (§ 29, chap. 466, Laws of 1877, as amended by chap. 328, Laws of 1884), which provides that in all assignments made pursuant to the act, the wages or salaries due to employes shall be preferred before any other debt, the instrument of assignment itself is not

104	606
e173	290

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rendered void by the omission to insert therein a clause giving such preference, the instrument is to be read in connection with the statute, as if the said provision formed part of it; and so, the statutory preference is impressed upon the trust fund in the hands of the assignee.

A statute imposing such a preference upon a voluntary assignment is not unconstitutional; the legislature may permit it to be made only on expressed conditions, and the assignor, by the act of making the assignment, accepts the conditions.

(Argued February 11, 1887; decided March 1, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department entered upon an order made March 5, 1886, which affirmed a judgment in favor of defendant, entered upon an order sustaining demurrer to plaintiffs' complaint.

The complaint alleged in substance the recovery of judgment in favor of plaintiffs against defendants, Herron and Spencer, and the return of execution thereon unsatisfied; that after the contraction of the debt upon which the judgment was rendered the debtors made an assignment for the benefit of creditors, and that defendant, Thurber, was by order of the court substituted as assignee in place of those named in the assignment. That the assignors were at the time of the assignment indebted to various employes for wages and salaries which were not preferred in the assignment. On which account the instrument was alleged to be fraudulent and void.

The defendants demurred on the ground that the complaint did not state a cause of action.

James L. Bishop for appellants. The act of 1884 requires an assignor when he owes wages, to prefer them by a direction to that effect in the instrument of assignment. (Laws of 1884, chap. 328, amending § 29 of chap. 466, Laws of 1877; *Roberts v. Tobias*, MSS. VAN BRUNT, J.; *Smith v. Hartwell*, MSS. INGRAHAM, J.; *Spaulding v. Jerome*, MSS. DANIELS, J.; *Robbins v. Omnibus R. R. Co.*, 32 Cal. 472; *Abbotsford*, 98 U. S. 440; *In re Lewis*, 81 N. Y. 421; *Thrasher v. Bentley*, 1 Abb. N. C. 39, 44; *People v. Albert*

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son, 55 N. Y. 50; *Benton v. Wickwire*, 54 id. 226; *Johnson v. H. R. R. Co.*, 49 id. 455; Sedgw. on Con. of Stat. [2d ed.] 205; *People v. Supervisors*, 17 N. Y. 235, 241; *Supervisors v. Brogden*, 112 U. S. 261, 268; *United States v. Benecke*, 98 U. S. 447; *N. Y. etc. R. R. Co. v. Van Horn*, 57 N. Y. 473; *Farmers' Bk. v. Hale*, 59 id. 53.) The act of 1884 is not an insolvent law and it does not convert the general assignment act of 1877 into an insolvent law. (*Burley v. Hartson*, 40 Hun, 121; *Thrasher v. Bentley*, 1 Abb. [N. C.], 39, 44; *In re Lewis*, 81 N. Y. 421, 424; *People v. Chalmers*, 1 Hun, 683, 686; aff'd, 60 N. Y. 154; *Boese v. King*, 78 id. 471; *In re Rider*, 23 Hun, 91; *In re Radke*, 10 Daly, 119; *Chapin v. Thompson*, 89 id. 270, 279; *In re Davis*, 1 How. Pr. [N. S.] 79, 85.) A general assignment being a private trust, based on contract, the legislature has no constitutional power to give it effect in violation of the express intention of the parties. (*Westervelt v. Gregg*, 2 Kern. 202, 212; *Wynehamer v. People*, 3 id. 395, 434; *Wilkinson v. Leland*, 2 Pet. 657; *Powers v. Bergen*, 6 N. Y. 358, 367; *Taylor v. Porter*, 4 Hill, 140, 147; *In re Albany St.*, 11 Wend. 148; *In re John & Cherry Sts.*, 19 id. 659; *Varrick v. Smith*, 5 Paige, 137; *Cochrane v. Van Sarley*, 20 Wend. 365; *Embury v. Connor*, 3 N. Y. 511; *In re Jacobs*, 98 id. 98; *Stuart v. Palmer*, 74 id. 188, 195; *Railroad Tax Cases*, 13 Fed. Rep. 752.) The statute did not become part of the assignment so as to alter the conceded intent of the parties as expressed in the instrument. (2 Pars. on Cont., 675; 2 Chitty on Cont. [11th ed.] 111.) The provisions of the statutes of the United States, conferring a priority of payments upon the United States in cases of insolvency, being the exercise of a sovereign power, are not analogous to the provisions of the act of 1884. (U. S. Const., art 1, § 8, subd. 18; *U. S. v. Fisher*, 2 Cranch, 388, 401; *U. S. v. State Bk. of N. C.*, 6 Pet. 35; *Livingston v. Moore*, Baldwin, 424, 429.) The statute does not create a lien in favor of debts due for wages. (*U. S. v. Fisher*, 2 Cranch, 358; *Conrad v. Atl. Ins. Co.*, 1 Pets 440, *Brent*

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v. *Bk. of Washington*, 11 id. 596, 611.) The assignment, not having been made as required by the statute, is void. (*Roberts v. Tobias*, VAN BRUNT, J., MSS.; *Hardman v. Bowen*, 39 N. Y. 196; *Britton v. Lorenz*, 45 id. 51; *Montford v. Montford*, 24 Hun, 120; *Rennie v. Bean*, id. 123.) The assignment being void, any judgment creditor may maintain an action to have it so declared. (*Andrews v. Roberts*, 18 Johns. 528; Wait on Fraud. Convey. § 413; Code, §§ 1872, 1873.)

E. More for respondent. In all assignments made in pursuance of the act of 1884 (Chap. 328), wages are preferred whether named in the assignment or not. (*Burley v. Hartson*, 40 Hun, 121.) If the statute requires the preference to be expressed, it is well settled that only those so entitled to the preference can raise the point. (Bishop on Assign., § 239; *Fox v. Heath*, 16 Abb. 163; *Morrison v. Atwell*, 9 Bos. 503; *Scott v. Guthrie*, 10 id. 408; *Powers v. Graydon*, id. 630; *Haynes v. Brooks & Brown*, Daily Reg., Sept. 21, 1885; *Chamberlain v. Dempsey*, 36 N. Y. 148; *Bullard v. Raynor*, 30 id. 206.) Courts will disregard the plain reading of a statute, and give effect to its purpose and intent. (*N. Y. & H. R. R. Co. v. Schuyler*, 34 N. Y. 80; *Mech. Bk. v. N. Y. C. & H. R. R. Co.*, 13 id. 621; *Johnson v. Underhill*, 52 id. 203.)

FINCH, J. The question involved in this controversy is, in some respects, so close and evenly balanced as to have produced conflicting opinions in the Supreme Court and drifted very able judges into disagreement. Either view of the problem seems open to some just criticism on the part of its adversaries, and the principal merit of our judgment upon the question will be that it is final, and settles the rule to be observed.

In 1884 the general statute regulating assignments by insolvent debtors was amended so as to provide that "in all assignments made in pursuance of this act the wages or salaries actually owing to the employees of the assignor or assignors

at the time of the execution of the assignment shall be preferred before any other debt, and should the assets of the assignor or assignors not be sufficient to pay in full all the claims preferred pursuant to this section they shall be applied to the payment of the same, *pro rata* to the amount of each such claim." Subsequent to that amendment a firm of insolvent debtors made and executed a voluntary assignment to the defendant, regular and in accordance with the general statute in all respects, except that it contained no preference for wages owing to employees. The plaintiffs recovered judgment against the assignors, issued execution thereon to the sheriff, and then commenced the present action in equity to set aside the transfer as fraudulent and void and an illegal obstruction to the collection of their debt, founding their sole objection upon the omission in the instrument itself to provide a preference for wages. Passing by the obvious incongruity, acted upon by the Special Term, of a creditor appealing to a court of equity for its aid against a fraud, which is only such because it benefits the creditor to the harm of others not before the court, we come at once to the real question of the true construction and meaning of the statute.

Briefly stated, the conflicting views revolve about the inquiry whether the enactment was intended to force into every assignment, as the contract and mandate of the assignor, a clause giving the desired preference, or to effect the result by its own statutory force, operating in every case as a condition added by the law, and effective even if unexpressed in the instrument. The argument of the appellants stands most strongly upon what is claimed to be the literal language of the statute, and insists that the legislature has spoken in plain and unambiguous language, and the courts must obey. We are not convinced that the language employed is free from ambiguity. The word "assignment" may sometimes have reference to the instrument which effects the transfer, and sometimes to the transfer itself, considered as a legal effect or result. A grant of land may sometimes refer to the deed or conveyance, and sometimes to the passage of the title and

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its vesting in the grantee. In such cases the context or the apparent meaning determine the sense in which the word is used. It is said of the statute before us that the word "assignment" is invariably used as referring to the instrument of transfer. To some extent that is true, but true because the manner of its use or the context disclose that intended meaning. When it is said in the act of 1877 that the assignment shall be acknowledged and recorded, there is no difficulty in understanding the necessary reference to the instrument. But when it is said that every "assignment" shall be in writing, it is equally plain that the assignment means the legal transfer to be effected only by an instrument in writing. And when again it is said that on an accounting the county judge shall have power to examine the parties and witnesses on oath "in relation to the assignment," we know from the character of the provision and what follows that the word "assignment" does not mean the mere written instrument, but is used in the broader sense of the transfer and trust which the written instrument makes effectual. So, in the section under consideration, we are to ascertain in which sense the word was used. The language is "in all assignments made in pursuance of this act." That may mean in all written instruments of assignment, or in all cases of a general assignment. The section adds that the wages "shall be preferred," without saying by the assignor or assignors, and declares that when the assets shall be insufficient to pay in full "all the claims preferred pursuant to this section" a *pro rata* payment shall be made. Here it is not directed that the assignor shall so provide, but that the assets "shall be applied" to such payment. It seems to dictate not what the assignor shall require, but what the assignee shall do, and speaks of the "claims preferred pursuant to this section," instead of the claims for wages preferred by the instrument of assignment. These considerations incline our opinions toward the construction of the respondent, and they are strengthened by reflection upon the purpose of the provision and the consequences of a different view. The object

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was the protection of employees. That purpose in the present case may be defeated if we are simply to declare the assignment void. Suppose, too, as the General Term suggests, that an assignment is made without any preferences, but gives up the whole estate to creditors equally. "Equality is equity," but does it become fraudulent because a preference is not given, or rather is not the statutory preference impressed upon the trust fund in the hands of the trustee?

We are warned, however, that this construction may lead to unconstitutional results. It is argued that an assignment is a private contract creating a private trust fund and the assignee derives all his powers from the instrument; that where the assignor does not prefer employees, if the statute does it, and compels the assignee to pay, the legislature stands in the attitude of appropriating the assignor's property against his will and in violation of his expressed intentions. But the difficulty is imaginary. No one doubts the power of the legislature to regulate and control general assignments for the benefit of creditors. It may permit them to be made as it has already done, only upon expressed conditions, and when it does so, he who makes an assignment by the act accepts and consents to the conditions. Availing himself of the permission he cannot be supposed also to repudiate its terms. That answer frees the Federal law from the accusation of confiscating the property of a debtor against his will. That law gives to the United States priority of payment, even in case of a voluntary assignment and it seems to be conceded that such priority is wholly irrespective of the terms of the assignment. The learned counsel for the appellants points out distinctions peculiar to the Federal law and to governmental functions. There is great force in his suggestions, and yet the illustration shows that a statutory preference, super-imposed upon a voluntary assignment, is not a novelty, or incapable of enforcement, or necessarily inconsistent with the rights of the citizen.

If we read this assignment in connection with the statute, and as if that formed part of it, we reach the one result

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which the statute sought to accomplish, and with much less of interference with the purpose and intent of the assignor than would follow from the utter destruction of his assignment. Without pursuing the subject further we conclude, though not without some hesitation, that the construction of the General Term in this case is correct.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

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119	124

ELI W. BLAKE, Respondent, v. CHESTER GRISWOLD, Appellant.

As the rights and liabilities under the penal provisions of the General Manufacturing Act (Chap. 40, Laws of 1848), are not only "regulated by special provision of law," but have no existence outside of the statute, the right of transfer given by the Code of Civil Procedure (§ 1910), does not under said Code give a right of enforcement to the transferee (§ 1909), but leaves the question of that right to the existing law.

The rule of the common law governs the question as to the survivability of a cause of action, to recover the penalty imposed by said act upon a trustee of a corporation organized under it, who has joined in making a false annual report; it is not affected by any provision of the Code, and the action abates upon the death of either party.

Where, however, the plaintiff in such an action dies, after the rendition of judgment, the action does not abate; the cause of action is merged in the judgment, which passes as assets to the representatives of the deceased, and they are entitled to be substituted in his place. (Code of Civ. Pro., §§ 1912, 1297, 1298).

It seems that until such substitution an appeal from the judgment may not be heard.

Where, however, an appeal to this court in such case was heard without knowledge of the death and the judgment was affirmed. *Held*, that on granting a motion for substitution the court could affirm the judgment in favor of the substituted representative.

(Submitted July 1, 1887; decided March 1, 1887.)

THIS was a motion to substitute Edgar O. Brackett, administrator of the plaintiff, who died pending the appeal to this

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court, as plaintiff in his stead, and for affirmance of the judgment appealed from in favor of the substituted plaintiff.

The case upon decision of the appeal is reported in 103 N. Y. 429.

The further facts presented on the motion are stated in the opinion.

A. Pond and *R. L. Hand* for motion. The judgment appealed from, rendered at Special Term, although recovered for a penalty, or for a cause of action in the nature of a penalty, merged the original claim or cause of action in the judgment so recovered, and on the death of the original plaintiff, Blake, while the case was pending in this court on appeal, such judgment being personal property and a chose in action, passed to his legal representative and became assets of the estate in his hands, at common law, precisely the same as it would have done had the judgment been rendered for a personal injury. (Code Civ. Pro., § 2514, subd. 2, 13; *Wood v. Phillips*, 11 Abb. Pr. [N. S.] 1, 2; *Dillon v. Linder*, 36 Wis. 344, 354; *Harris v. Hammond*, 18 How. 123, 124; *In re Pioneer Paper Co.*, 36 id. 111, 114; *Sage v. Harpending*, 49 Barb. 166, 174; *Downer v. Howard*, 44 Wis. 82, 87.) By the Code of Civil Procedure the original claim of Blake upon the defendant, and the statutory liability of the latter to pay the debt of the company owing to Blake was made transferable, and hence the same would have passed to Blake's administrator, even if it had not been put into judgment before the death of Blake. (Code of Civ. Pro., §§ 755, 1909, 1910.) By the scheme established by the Code of Civil Procedure this court has the power at common law to grant an order of substitution where the death of a party occurs after a case is brought here by appeal. (Code of Pro., § 121; Code of Civ. Pro., § 757; *Hastings v. McKinley*, 8 How. 175; *Miller v. Gunn*, 7 id. 159; *Schuchardt v. Remiers*, 28 id. 514; *Downer v. Howard*, 44 Wis. 82, 87, 89, 90; 1 Wait's Practice, 155; *Wood v. Phillips*, 11 Abb. [N. S.] 1; Throop's Code, § 1298; Bliss' Code, § 1298.)

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Wm. C. Holbrook opposed. At common law an action in form *ex delicto* abated upon the death of a sole plaintiff or defendant, whether such party died before or after judgment, except where the remedy was extended to the personal representatives by the statute law. (Broom's Legal Maxims, 911; 4 Edw. 3 c. 7; 25 Edw. 3 st. 5 c. 5; 3 and 4 Will. 4 c. 42, § 2; *Moore v. McKinstry*, 37 Hun, 197.) Our Revised Statutes have proceeded upon the assumption that this rule of the common law was in force in this State, and without legislative sanction actions for a tort could not be maintained against the tortfeasor by the personal representatives of the deceased party. (*Kelsey v. Jewett*, 34 Hun, 11; *Zabriskie v. Smith*, 3 Kern. 332, 336; *Hegerich v. Keddie*, 99 N. Y. 258; *Stokes v. Stickney*, 96 id. 323; *Schrieber v. Sharpless*, 110 U. S. 76; *Bk. of Cal. v. Collins*, 5 Hun, 209; *Reynolds v. Mason*, 54 How. Pr. 213; 6 Week. Dig. 531; 2 R. S. 448, § 1.) The provisions of the present Code are not sufficiently broad to, and do not, save from abatement an action based upon the penal sections of the General Manufacturing Act, where a sole plaintiff dies after final judgment. (Code Civ. Pro., §§ 755, 767; *Webber's Ex'rs v. Underhill*, 19 Wend. 447; *Livermore v. Bainbridge*, 49 N. Y. 127.) There was no such merger of the penal causes of action in the judgment as to save them from abatement, or to change their original form from causes of action *ex delicto*, to causes of action *ex contractu*, or so as to make the judgment property, in the sense that it passed to plaintiff's representatives as a property right or interest. (*Wood v. Phillips*, 11 Abb. [N. S.] 1; *Gerry v. Post*, 15 How. Pr. 121; *Ireland v. Litchfield*, 22 id. 179; *State of Louisiana v. Mayor, etc., of New Orleans*, 109 U. S. 285; *O'Brien v. Young*, 95 N. Y. 428.)

Per Curiam. The motion for substitution must be granted. The plaintiff in the action, which was brought to recover the penalty imposed for failure to file a report and for filing a false report, under the provisions of the manufacturing act, died after judgment and during the pendency of an appeal. The argument of that appeal proceeded in this

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court without our knowledge of his death and the judgment was affirmed. This motion is now made on behalf of the representatives of the plaintiff to substitute his administrator and for judgment of affirmance in his favor. The motion is both made and resisted upon a claim that the whole law of the survival of causes of action has been subjected to a radical change which makes erroneous the drift of our recent decisions, and requires at our hands the adoption of a new rule founded upon modifications effected by the Code of Civil Procedure. The defendant claims that these changes have taken away all provisions for saving from abatement, even after judgment, an action like the present (§ 764), and the plaintiff that all causes of action are made assignable and therefore survive except those specifically named (§ 1910); and so we have been mistakenly following the common law as modified by the Revised Statutes, instead of recognizing the new rule derivable from the Code. If such had been the intention of the legislature, it is quite singular that the repealing act of 1880, passed to remove from the statutes inconsistent and superfluous provisions, which had become such by the adoption of the Code, should not only have failed to repeal the two sections of the Revised Statutes (2 R. S., 448, §§ 1, 2), which in connection with the common law, furnished the rule of survival, but should have expressly excepted and preserved them. (1 Laws of 1880, p. 368.) And, not only that affects the conclusion to be reached, but the circumstance still more remarkable, that no new or substituted rule of survival should be directly supplied by the Code, but the change, so radical and important, should be left wholly to a possible inference derived from a modification in the assignability of causes of action. While it is true that, at common law, and as a general rule, the qualities of assignability and survival are tests each of the other, and convertible terms, and we have so declared (*Hegerich v. Keddie*, 99 N. Y. 258; *Brackett v. Griswold*, 103 id. 425), it does not follow that the legislature may not break that connection, and furnish a new and statutory rule of assignability, leaving

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the law as to the survival of causes of action unchanged. Possibly, so much has been accomplished, but certainly nothing more. While section 1910 makes an apparent extension of the rule of assignability, and section 1909 allows what can be transferred to be enforced, the last provision is expressly declared to be not applicable to a case "where the rights or liabilities of a party to a claim or demand which is transferred are regulated by special provision of law." The "rights and liabilities" of parties under the penal provisions of the Manufacturing Act are not only "regulated" by special provisions of law, but are wholly created by such special provisions, and have no existence outside of the exceptional and peculiar authority and regulation of the statute. So that in the present case, as also in *Brckett v. Griswold*, the right of transfer given by the Code does not under the same Code give a right of enforcement to the transferee, but leaves the question of that right to the existing law. (§ 755.) The test remains whether the cause of action survives or continues. When, therefore, we said in *Hegerich v. Keddie* (*supra*) and followed the doctrine in *Brckett v. Griswold*, both of which were purely statutory actions, created and regulated by special enactments, that the rule of survival contained in the Revised Statutes must govern, we not only had the assent of counsel who argued their cases upon that basis, but the authority of section 1909 of the Code itself. If the legislature desires to adopt some different and simpler rule, and bring together what perhaps it would be wiser not to try to separate, it may do so in the future, but has not as yet accomplished the work. We grant this motion, therefore, not upon the ground asserted, but in accord with the settled rule that the cause of action after judgment is merged in the judgment, which itself may be assigned, and passes as assets to the representatives of a deceased party. Section 1912 clearly recognizes this rule by the expression that such a judgment "recovered upon *any* cause of action" may be transferred, but "if vacated or reversed the transfer thereof does not transfer the cause of action, unless the latter was

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transferable before the judgment was recovered." Sections 1297 and 1298, relating to the death of a party pending an appeal, lead to the same conclusion. They indicate that until substitution the appeal cannot be heard, and so the argument had was irregular, but since it was thorough and exhaustive and followed by a motion for a reargument, and a third consideration of the case would do no more than waste the time of the court, we think we may accede to the request of the moving party, and having granted his order of substitution, also affirm the judgment appealed from in favor of the substituted administrator.

All concur.

Ordered accordingly.

In the Matter of the Final Accounting of JAMES P KERNOCHAN, et al., Executors, etc.

The will of M. gave to his executors certain portions of his estate in trust "to receive the rents, interest and income," and to apply the net amounts thereof to the use of the testator's widow during her life, remainder to beneficiaries named. The testator died during the night of April 30, 1881. The trust fund included certain shares of stock of the P. R. R. Co. On April 14, 1881, a dividend of \$25,000 was declared on this stock, "payable May 2, 1881." On final accounting the executors charged themselves with this sum, treating the dividend as principal. *Held*, no error; that as soon as the dividend was declared the owner of the shares was entitled to it, and it became part of his estate; also the fact that it was made payable at a future time was immaterial; and that the dividends to which the life tenant was entitled as income were only those declared after the testator's death.

Cognovell v. Cognovell (2 Edw. Ch. 331), distinguished.

On the same principle, *held*, that the widow was entitled to the whole of an extra dividend, declared after such death, although made from net earnings accumulated before that time; that, whenever earned, they were not profits until so declared.

Prior to the death of the testator the P. R. R. Co. had accumulated a fund from earnings which was set aside as a sinking fund to pay outstanding obligations. Certain of the stockholders, including the executors, entered into an agreement with another company for

104	618
112	634

104	618
154	196

104	618
172	144

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a sale of their stock to the company at \$250 per share, the company to have the sinking fund, and to pay said shareholders a ratable portion thereof, which was equivalent to \$15.74 per share. In the account this was included as part of the price received and credited as principal. *Held*, no error; as it was received, not as a dividend, but as part of the price for which the stock was sold, and so belonged to the remaindermen.

The executors classed as income the value of certain options or privileges given to stockholders by various companies to subscribe for and take at par certain stocks and bonds. *Held*, error; that as the right accrued only on condition the estate chose to purchase or pay for the bonds or stocks, if the options were accepted the purchases operated to increase the capital or change its manner of investment, and so the value of the options did not belong to the life tenant.

The testator had in his hands for investment and reinvestment certain moneys belonging to his wife, which he mingled with his own funds. *Held* (EARL, J., dissenting), that the estate was properly charged with compound interest thereon.

By the will Mrs. M. was appointed executrix; she duly qualified and acted as such. The will contained a direction that each executor and trustee, other than his wife, "do receive and take the full rate of commissions provided by law for each executor;" substantially the whole income of the estate was given to her. *Held*, that she was not entitled to commissions as it was the intention of the testator to exclude her from compensation.

(Argued November 30, 1886; decided March 8, 1887.)

CROSS-APPEALS from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made January 18, 1886, which affirmed a decree of the surrogate of the county of New York on final accounting of the executors of the will of John R. Marshall, deceased.

The facts, so far as material to the questions discussed, are stated in the opinion.

M. W. Divine for executor, appellant. Cash dividends declared during a life tenancy from accumulated earnings, or profits, belong to the life tenant, whether such dividends be large or small. (*Woodruff's Estate*, 1 Tucker, 58; *Clarkson v. Clarkson*, 18 Barb. 646; *Simpson v. Moore*, 30 id. 637; *Goldsmith v. Swift*, 25 Hun, 201; *Riggs v. Cragg*, 26 id. 103; *S. C.*, 89 N. Y. 487, *Hyatt v. Allen*, 56 id. 553; *Jones v.*

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T. H., etc., R. R. Co., 57 id. 186; *Clapp v. Astor*, 2 Edw. Ch. 240; *Cogswell v. Cogswell*, 2 Ed. Ch. 231, 240, *Scovel v. Roosevelt*, 5 Redf. 121; *Sproule v. Bouche*, L. R. 29 [Ch. Div.] 653; *Barclay v. Wainwright*, 14 Ves. 67; *Price v. Anderson*, 15 Simons, 473; *Preston v. Melville*, 16 id. 163; *Bates v. McKinley*, 31 Beav. 280; *Clive v. Clive*, Kay 600, *Johnson v. Johnson*, 15 Jur. 714; *Murray v. Glassee*, 17 id. 816; *Phimbe v. Nield*, 6 id. [N. S.] 529; *Ware v. McCandish*, 10 Leigh. 595; *Read v. Head*, 6 Allen, 174; *McClaren v. Stainton*, 3 DeG. F. & J. 202; *Brander v. Brander*, 4 Ves. 800; *Paris v. Paris*, 10 id. 184; *Witts v. Steere*, 13 id. 363; 2 Perry on Trusts [3d ed.] § 544; *Minot v. Paine*, 99 Mass. 108; *Daland v. Williams*, 101 id. 573, *Leland v. Hayden*, 102 id. 550; *Read v. Head*, 6 Allen, 174; *Heard v. Eldridge*, 109 Mass. 258; *Gifford v. Thompson*, 125 id. 478; *Wiltbaugh's Appeal*, 64 Pa. St. 256; *Earp's Appeal*, 28 id. 368; *Van Doren v. Olden*, 19 N. J. Eq. 176; *Lord v. Brooks*, 52 N. H. 72; *Pierce v. Burroughs*, 58 id. 302; *In re Brown*, 14 R. I. 371; *Phelps v. F. & M. Bk.*, 26 Conn. 272; *Vail v. Vail*, 49 id. 52; *Brimley v. Grou*, 50 id. 75.) Until declared as a dividend profits belong to the corporation, and when a distribution is made it must be among those who, at the time of the distribution, are owners of the stock. (*Jones v. T. H., etc., R. R. Co.*, 57 N. Y. 196; *Brundage v. Brundage*, 65 Barb. 397; *Granger v. Bassett*, 98 Mass. 462; Perry on Trustees, 87, § 545; *Hyatt v. Allen*, 56 N. Y. 558.) The stock options, or dividends, were properly classed as income. (*Clarkson v. Clarkson*, 18 Barb. 646; *Simpson v. Moore*, 30 id. 637; *Riggs v. Cragg*, 26 Hun, 102; *Wiltbaugh's Appeal*, 64 Pa. 256; *Atkins v. Albree*, 12 Allen, 359; *Gray v. Portland Bk.*, 3 Mass. 364; *Minot v. Paine*, 99 Mass. 101; 11 C. E. Green, 11; 29 N. J. E. 625.) The sinking fund dividend of \$15.74 2-7 per share should have been carried to the credit of income account. (*Bates v. McKinley, supra*; *Hopkin's Trusts, supra*.) The life tenant's legal interest in the income of the estate commenced immediately on the death of the testator. (*Cogswell v. Cogswell*, 2

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Ed. Ch. 231; *Clive v. Clive*, Kay, 600; *Woodruff's Estate*, 1 Tucker, 59; *Riggs v. Cragg*, 26 Hun, 88-102; *Bates v. McKinley*, 31 Beav. 280; *In re Hopkin's Trusts*, L. R. 18 [Eq. Cas.] 696.) The letter, written under the direction of the testator, was competent evidence as to the terms upon which he held his wife's property. (1 Phillips on Ev., 402, chap. 8, § 10.) The allowance to the executrix of commissions was proper. (Code Civ. Pro., § 2736; *Betts v. Betts*, 4 Abb. N. C. 437; *In re Vanness*, 1 Tucker, 130; *Eager v. Roberts*, 2 Redf. 247; *In re Pike*, id. 255.)

J. Frederic Kernochan for executors accounting, respondents. Until a dividend is declared the earnings pass with the transfer of the stock as a portion of the capital of the company. (*Boardman v. L. S. & M. S. R. Co.*, 84 N. Y. 177.) When a dividend is declared the amount represented by the dividend becomes entirely several from the stock, and will not pass to a purchaser of the stock even though it is not payable until a subsequent date. (*Hyatt v. Allen*, 56 N. Y. 553; *Hill v. Newichawanic Co.*, 8 Hun, 459; 71 N. Y. 593.) When the property which is passed into a dual ownership is a certificate of stock the *corpus* to be preserved for the remainderman is that aliquot proportion of the whole corporate property which is represented by the ratio which the number of shares included in the certificate bears to the whole number of shares of stock in the corporation and "the corporate property" is not only the original "plant" of the company, but also the earnings then undivided, whether they be in cash or in betterments. (*Boardman v. L. S., etc., R. R. Co.*, 84 N. Y. 177.) Every dividend, whether of stock or cash, that is to any extent a diminution of the value of the *corpus* as it existed at the time the dual ownership commenced, is to that extent capital. (*Minot v. Paine*, 99 Mass. 108; *Daland v. William*, 101 id. 571; *Leland v. Hayden*, 102 id. 542; *Heard v. Eldridge*, 109 id. 258; *Gifford v. Thomas*, 115 id. 478; *Sproule v. Bouche*, 29 Eng. L. R. Ch. Div. 635.) The letter written by James P. Kernochan on testator's direction and examined by

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him, became in law testator's own letter and is competent. (1 Phillips on Ev., chap. 5, § 4, pp. 100, 101; *Shear v. Van Dyke*, 10 Hun, 528; *Gillespie v. Brooks*, 2 Redf. 349.) Under statute and by common law, executors have the power to settle claims with the approval of the surrogate. (*Wood v. Tunncliffe*, 74 N. Y. 38.)

William Jay special guardian of Marie Marshall. The ownership of a dividend is determined on the day when it is declared, without reference to the day when it is actually paid. (*Hyatt v. Allen*, 56 N. Y. 553; *Hall v. Newichawanic Co.*, 8 Hun, 459; affirmed, 71 N. Y. 593; *Goldsmith v. Smith*, 25 Hun, 201.) The contention of Mrs. Marshall's executors that the value of the option to subscribe for other stock and amounting to \$44,478, was properly classed by the executors as income, and that the learned surrogate erred in allotting this sum to the principal, is untenable. (*Atkins v. Albree*, 94 Mass. 359; *Boardman v. L. S. & M. S. R. R. Co.*, 84 N. Y. 157; *Moss's Appeal*, 83 Penn. St. 364; *Minot v. Paine*, *supra*; *Brinley v. Grou*, 50 Conn. 66.) The interest paid to Mrs. Marshall on her money in the testator's hands is excessive, in that interest is calculated upon interest, whereas if the estate of the testator is liable for interest at all, simple interest only can be recovered. (*Conn. v. Jackson*, 1 Johns. Ch. 13; *Young v. Hill*, 67 N. Y. 162; *Ackerman v. Emott*, 4 Barb. 626; *Lansing v. Lansing*, 45 id. 182; *Smith v. Velie*, 60 N. Y. 106.) The allowance of commissions to the widow as an executrix under the will of the husband is contrary to the provisions of the will. (*Secor v. Sentis*, 5 Redf. 570; *In re Gerard*, 1 Dem. 244.)

Edward S. Dakin special guardian for Marshall R. Kernochan. Compound interest should never be calculated except by special agreement made on consideration after the simple interest has become due. (*Young v. Hill*, 67 N. Y. 162; *State of Conn. v. Jackson*, 1 Johns. Ch. 13.) The testator's letter to Mrs. James does not constitute any agreement. The statute providing for the award of commissions by the

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surrogate on the settlement of an executor's accounts is not mandatory, it only furnishes a definite rule as to amount when any such rule is to be applied. (*Secor v. Sentis*, 5 Redf 570; *In re Gerard*, 1 Dem. 244.) In every case where an extra dividend of surplus earnings is made in cash, it is clearly equitable to pass to capital such part of said dividend as is shown to have been earned before the life tenancy commenced. (*Hill v. Newichawanie Co.*, 8 Hun, 459; 71 N. Y. 593; *Sproule v. Bouche*, 52 L. T. [N. S.], 366; *Minot v. Paine*, *supra*; *Deland v. Williams*, 101 Mass. 571; *Leland v. Hayden*, 102 id. 542; *Brinley v. Grou*, 50 Conn. 66; *Van Doren v. Alden*, 19 N. J. Eq. 117.) The value of the options and privileges was properly adjudged to be capital. (*Atkins v. Albree*, 12 Allen, 359.)

DANFORTH, J. This is an appeal from a judgment of the Supreme Court, affirming a decree of the surrogate of the county of New York, on a judicial settlement of the account of the executors of John R. Marshall, deceased. The account was objected to by several of the parties interested, and with the objections, sent to a referee to hear and determine. Upon the coming in of his report, it was in substance confirmed by the surrogate, and upon appeal to the General Term, his decision was affirmed. All parties claim under the will of Mr. Marshall, and the principal questions now raised concern the rights of the donee for life and the remaindermen, and depend for an answer upon the true construction of that provision of the will which empowers the executors "to receive the rents, interest and income" of so much of the estate as was given to them in trust, to apply the net amounts of such rents or income to the use of the widow of the testator during her life, and after her death to divide the remaining estate among his surviving daughters and the issue, if any, of such as may have died.

Among the items of personal property left by the testator was one of 5,000 shares of the capital stock of the Panama Railroad Company. This was inventoried by the executors

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at \$100 per share, as its par value, and \$275 as its market value, and \$1,375,000, as its assessed value. On the 14th of April, 1881, a dividend of \$25,000 (No. 90) was declared upon this stock, payable May 2, 1881. The testator died during the night of April 20, at ten minutes past eleven o'clock. The executors treated this dividend as principal, and charged themselves with it in these words; "Panama dividend declared April 14, 1881, books closed for transfer April 20, 1881, 2 P. M., and payable May 2, 1881." Mrs. Marshall, the widow and executrix of the testator, objected to this in both characters, alleging "that no such amount as the said sum of \$25,000 formed any part of the estate of John R. Marshall at the time of his death, and that said statement and item, and said amount of \$25,000, should be stricken from said inventory and from said account," and added to the items of income, and as such received by the executors.

The decision of the surrogate was against her contention, and, we think, properly. As soon as the profits on shares of stock are ascertained and declared, they cease to be the property of the company, and the owner of the shares becomes entitled to the dividend. It at once forms part of his estate. The fact that they are made payable at a future time is immaterial. The dividend to which the life tenant may be entitled as income, can only be that which the company declares after that relation is acquired. In this case the dividend represented profits, or income, but had become a debt before the will took effect. Mrs. Marshall was entitled to income merely.

In *Cogswell v. Cogswell* (2 Edw'ds, Ch. 231), cited by the appellant, the testator directed that his wife be permitted "to take the interest or dividends" on certain stock and the question submitted was "as to the time from which she would be entitled to dividends," and the vice-chancellor said from the death of the testator, "that is to say," he adds, "the dividends which may accrue, or be declared, or become payable at any time after" that event. The terms of the will and the question were unlike those before us. The will in one

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case gives income or profits, in the other dividends, that is the share of income or profits already ascertained and declared. The first gives that to which the testator had no legal title. The other might include that of which he became the legal owner on the day when the dividend was declared, although it remained unpaid. (*Hyatt v. Allen*, 56 N. Y. 553; *Hill v. Newichawanick Co.*, 8 Hun, 459, affirmed in 71 N. Y. 593.

Second. It is stated in the account that the 5,000 shares of Panama railroad stock were sold to the Panama Canal Company for \$265.74 $\frac{1}{2}$ per share, making \$1,328,714.32. The life tenant objected to the account in this respect, alleging that in fact the stock was sold at \$250 per share only, and not \$265.74 $\frac{1}{2}$, as in the account stated. The facts, so far as they are deemed material in presenting this question, and as found by the referee, show that prior to the death of the testator, the Panama Railroad Company had not only earned and paid dividends, but had accumulated securities, money and other assets from earnings over and above expenses and dividends, and on the 10th of June, 1881, had on hand \$1,102,000 as a sinking fund for the redemption of outstanding obligations. On the day last named an agreement was entered into between certain stockholders of the railroad company and the Universal Inter-Oceanic Canal Association for the sale of their stock to the canal association for \$250 for each share, and also providing that the canal company should have the sinking fund, but that the stockholders should be paid by the canal company a sum equal to a ratable proportion of the \$1,102,000 sinking fund above-named, which was equivalent to \$15.74 per share of the capital stock. This makes the sum of \$78,714.34, and in the account of the executors is merged in the price at which the stock was sold the canal company and credited to principal. This disposition was sustained by the referee and surrogate, the life tenant excepting thereto and claiming it should have been carried to income. We think the exception cannot stand. The money was not paid as a dividend, nor was it distributed among stockholders, but only to such as sold their shares to

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the new company — the canal association. Indeed, as stockholder, no one received any part of it. It was paid as a price to the seller. The Panama Railroad Company was not dissolved and its stockholders who did not sell have continued to receive dividends, and the canal company which purchased the shares once owned by the testator, have received in like manner dividends on the shares so purchased. Had the shares been retained by the executors, the money in question would not have been received by them. It is true that the sale in effect carried with it the interest which each shareholder, as a member of the company, had in the sinking fund, so that the new shareholder was substituted for the old. The fund was the accumulation of profits, and may properly be regarded as part of the capital of the company. But it still remained pledged for the bonds, for the payment of which it was created, and its possible value only enhanced the value of the shares. The price paid for the shares, although increased by this prospective advantage belonged altogether to the remaindermen, and was properly carried to principal and not income.

Third. It was also provided in the same agreement of June tenth, that all earnings of the railroad company to and including June, 1881, and all moneys and other effects not by that agreement to be left with the railroad company, should be transferred by the railroad company to a trustee "for the benefit of all the existing stockholders," and belong to, and be divided among the shareholders "who are such at the time of the declaration of such dividend" or transfer of the railroad company.

This was not carried out, but before June thirtieth, the assets so referred to were sold and transferred by the railroad company to a syndicate for the sum of \$1,693,200, and this was paid to the railroad company June 30, 1881. It amounted to \$24.26 on each share of the capital stock of the railroad company, and on the same day the railroad company, on the report of its treasurer that the amount of funds on hand "subject to distribution, was sufficient to authorize a dividend

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of \$24.26 upon each share of the capital stock of the company," adopted the following resolution :

"*Resolved*, That a dividend of twenty-four dollars and twenty-six cents (\$24.26) on each share of the capital stock of this company be, and the same is, hereby declared, payable on and after Monday, the first day of August next, to the stockholders of record, or their legal representatives. That the books of transfer be closed on the afternoon of the thirtieth instant, and be reopened on the morning of the 2d of August, 1881." This dividend was numbered "91" in regular order, and was payable and paid at the time the usual quarterly dividends were paid. It appeared also that the assets which formed the consideration of the payment by the syndicate, were accumulated net earnings, represented by cash or securities calling for cash. The executors credited to income the above amount of \$24.26 per share, making \$121,300. It was objected, in behalf of the remaindermen, that the credit to income was wrong, and that the sum of \$121,300 should have gone into the principal of the estate. The referee finds and reports that of this sum only \$22,442.85 should be regarded as income belonging to the life tenant, and the residue, \$98,857.15, should be regarded as a portion of the *corpus* of the estate. To so much of this finding as appertains any part to principal, exception was taken in behalf of the life tenant.

The referee made the apportionment in question by ascertaining how much was earned before and how much after the death of the testator, and so doing applied a rule which may be founded on general equity, viz : that when a fund is given for life to one beneficiary, and remainder over, the first shall have its earnings after his life tenancy begins, and the remainderman the balance. I find nothing in the will which indicates that the testator intended any such investigation or division, or that any other than the ordinary rule, which gives cash dividends declared from accumulated earnings or profits to the life tenant, should be applied. The direction to his

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executors is to receive the rents, interest and income of his estate, and apply the net amount of such rents or other income (with certain exceptions not now material) to the use of his wife. From the shares in question no income could accrue, no profits arise to the holder until ascertained and declared by the company and allotted to the shareholder, and that act should be deemed to have been in the mind of the testator, and not the earnings or profits as ascertained by a third person, or a court upon an investigation of the business and affairs of the company, either upon an inspection of their books or otherwise. This was held in *Olapp v. Astor* (2 Edwds. Ch. 379), in construing a contract relating to "net profits or dividends," and by this court, in *Hyatt v. Allen* (56 N. Y. 553); the principle stated was said to be founded in good sense and applied in construing an agreement made August 11, 1871, which provided that "all profits and dividends of and upon" certain "stock," up to the 1st of January, 1872, should be paid to defendant. No dividends were declared, or distribution of profits made prior to that time, but in April, 1872, a dividend of \$15 per share was declared and was received by defendant. Plaintiff sued to recover it, and a referee found that \$250 of this dividend was earned between August 11, 1871, and July 1, 1872, and gave judgment for that amount. This court reversed the judgment, saying there were profits earned by the corporation up to January 1, 1872, but they were not the profits of the stockholders in any legitimate sense. "There were no profits accruing to the stockholders until they were set apart by the corporation for their use." The same principle is to be applied in determining the relative rights of a tenant for life and a remainderman. Payments in respect of profits accruing and properly divisible as such, are income and belong to the tenant for life, if the sum payable is ascertained and declared after the testator's death.

In *In re Hopkin's Trust* (L. R., 18 Eq. 696), a holder of shares bequeathed his personal estate to trustees, in trust, to permit his wife to receive the dividends, interest and income

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thereof for her life, remainder over. He died in December, 1870. In January, 1873, an extraordinary dividend was declared on part of the shares for five years previously, and in July, 1873, a special dividend was declared on others for the half year previous. It was held that the life tenant was entitled to both; that although the company might have capitalized the earnings they, by resolution, treated the money as dividend and not capital and their decision was conclusive. The same effect was given to the determination of the company in characterizing its earnings in *Barton's Trust* (L. R., 5 Eq. 238, 245); and the rule is a reasonable and proper one, which limits the right of a stockholder to profits by the action of the managers of a corporation or company. It is their sole and exclusive duty to divide profits and declare dividends whenever, in their judgment, the condition of the affairs of the corporation renders it expedient, and it would lead to great embarrassment and confusion if a court should undertake to interfere with their discretion so long as they do not go beyond the scope of their powers and authority.

In this case no portion of the earnings which entered into the dividend had been capitalized by the company, and, therefore, the inquiry when the profits were earned, out of which it was to be paid, was immaterial. It is not claimed that the declaration of the dividend, as dividend from profits, was *ultra vires*, and whenever earned they were not profits until the directors so declared. In *Hyatt v. Allen* (*supra*), it was thought by the learned judge, who spoke for the court, that "a gift of the profits and dividends of stock for life would not be held to carry dividends declared after the death of the beneficiary, although made from profits accrued during his life," making the act of the company conclusive and giving the earnings to the time of the declaration of the dividend. *Sproule v. Bouch* (L. R. [29 Ch. Div.] 635, 653) sustains this view. "The general principle applicable to these inquiries may, in our opinion," say the court in that case, "be thus stated: When a testator or settlor directs or permits the subject of his disposition to remain as shares or stock in a

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company, which has the power either of distributing its profits as dividend, or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under him (the testator or settlor) in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital. In a word, what the company says is income shall be income, and what it says is capital shall be capital." I think, therefore, the executors properly carried the whole of this dividend (91) to income, that the referee and surrogate erred in making an apportionment, and, therefore, that the exception of the life tenant should prevail.

Fourth. The executors classed as income certain options or privileges given by various companies in 1881, to subscribe for stocks and bonds, in all of the value of \$44,478. This was objected to by the remaindermen and the objection sustained by the referee and surrogate.

The privilege or option was to subscribe for, and take at par one or more bonds or shares of stock for a certain number of shares of stock already held by the estate. The right to subscribe belonged to the trust estate and accrued upon condition the estate chose to pay for, or purchase the bonds or stock. If the option was accepted, the purchase operated to increase the capital or change its manner of investment, and if not accepted, the life tenant could neither complain of the choice of the trustees, nor in any way control their discretion. We think its value did not belong to her, and that the decisions of the referee and surrogate in regard thereto, were correct.

Fifth. The guardian of Marie Marshall (a person of unsound mind), and the guardians for Kernochan (an infant) also appeal against, first, allowance of compound interest on moneys found due to Mrs. Marshall from the testator; second, commissions to Mrs. Marshall. First. Both referee and surrogate were against the objectors as to the first. As to the

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second, the referee sustained the objection, but the surrogate overruled it and allowed \$15,000 to Mrs. Marshall as commissions. As to the first the testator had the principal moneys in hand for the purpose of investment and reinvestment, but mingled them with his own funds. It was not improper, therefore, under the circumstances of this case, to charge him with interest upon interest, as if received in the usual manner, for he forebore investment and used the moneys for his own convenience.

As to commissions: The referee found that Mrs. Marshall "duly qualified as executrix of the last will and testament of John R. Marshall, deceased, on the 8th day of October, 1881 and has been at all times since that date ready and willing to take part, and has taken part in the management of the estate."

The objection raised in behalf of the remaindermen hangs upon the request of the testator contained in the will, in these words: "It is also my request that all persons herein named as executors will consent to act as such executors and trustees, and that each executor and trustee, other than my wife, do also receive and take the full rate of commissions provided by law for each executor, intending thus to provide suitable compensation for their services in and attention to the duties herein devolved upon them." We think the intention of the testator was to exclude his wife from compensation. Substantially the whole income of the estate, the result of the management of the executors, of whom she was one, is given to her, and it cannot be supposed that he intended she should also be paid for caring for it.

The decree of the surrogate and judgment of the Supreme Court should be modified according to the above opinion, and, as so modified, affirmed without costs in this court to either party.

RUGER, Ch. J., RAPALLO and FINCH, JJ., concur; EARL, J., concurs except as to allowance of compound interest, and as to that item he dissents; ANDREWS, J., dissents as to the \$24.26 a share on the ground that it was in substance a closing out of the sale of the stock and a distribution of capital.

Judgment in accordance with opinion.

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ANNIE COOKE LAWRENCE, an Infant, etc., Respondent, v.
SARA L. COOKE, Appellant.

The will of C., after a gift of his residuary estate to his daughter, the defendant, and "to her heirs and assigns forever," contained this provision "I commit my granddaughter (plaintiff) * * * to the charge and guardianship of my daughter. * * * I enjoin upon her to make such provision for said grandchild out of my residuary estate * * * in such manner and at such times and in such amounts as she may judge to be expedient and conducive to the welfare of said grandchild, and her own sense of justice and Christian duty shall dictate." In an action wherein the plaintiff sought to have it adjudicated that a trust was imposed upon the residuary estate for her benefit, and wherein defendant, by her answer, recognized the moral obligation resting upon her and averred her intention of performing it. *Held*, that no such trust was created, nor did defendant take subject to a charge in favor of plaintiff; but that she took an absolute title the provision to be made for plaintiff being left wholly to her discretion, as to the amount and manner of the provision and the time when it should be made, the exercise of which discretion could not be interfered with by the court.

Lawrence v. Cooke (32 Hun, 126) reversed.

(Argued January 25, 1887, decided March 8, 1887.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made March 28, 1884, which reversed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term, and which directed judgment in favor of plaintiff. (Reported below, 32 Hun, 126.)

The nature of the action and the material facts are stated in the opinion.

W. R. Darling for appellant. The General Term erred in holding that the seventh clause of the will creates a trust for plaintiff. (*Campbell v. Beaumont*, 91 N. Y. 465; *Freeman v. Coit*, 96 id. 63; *Roseboom v. Roseboom*, 81 id. 356; *Clarke v. Lupp*, 88 id. 231; *Parsons v. Best*, 1 N. Y. Supr. Ct. 211; 2 *White & Tudor's Ld'g Cas.*, part 2, Am. Notes, 1859; 1 *Perry on Trusts* [3d ed.], § 115.) After an absolute devise, no subsequent language less decisive than

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itself is sufficient to show an intent to cut it down or change it. (*Hopkins v. Glunt*, 4 East. Rep. 117; *Thornhill v. Hall*, 11 C. & F. 22; 81 N. Y. 359; 96 id. 63; *Reid v. Atkinson*, 5 Irish Rep. (Eq.) 373, 377, 378-386.) The tendency of modern decisions is against raising a trust by mere inference from doubtful words. (*Campbell v. Beaumont*, 91 N. Y. 465; *Foose v. Whittemore*, 82 id. 406; Lewin on Trusts, 173.) The word "enjoin" of the seventh clause, when read as qualified by the words with which it is coupled, is shorn of all legal imperative force and reduced to merely precatory significance. (*Meredith v. Heneage*, 1 Sim. 542, 556; *Hone v. Kent*, 11 Barb. 315; *Kane v. Astor's Ex'rs*, 5 Sandf. [S. C.] 467; Hill on Trustees, 73; *McCormick v. Grogan*, 4 L. R. [H. of L.] App. Cas. 95; *Lines v. Darden*, 5 Fla. 51, 72.) The words "as she shall think expedient" conferred an absolute discretion "to give or not to give, and how much. (2 White & Tudor's Ld'g Cas., part 2, Am. Notes, 1860; *Gisborne v. Gisborne*, 25 Week. Rep. [Eng.] 517; 23 id. 410, 411; *French v. Davidson*, 3 Mad. Ch. R. 396; *Colton v. Colton*, 21 Fed. Rep. 594, 596, 597; *Knight v. Boughton*, 11 C. & F. [H. of L.] App. Cas. 513, 553; *Mackett v. Mackett*, 2 Moak's Eng. Rep. 412; *S. C.*, L. R. 14 Eq. 49; *Lamb v. Eames*, L. R. 6 Ch. App. 599, 607; 1 Redf. on Wills, 707, 708; *Pope v. Pope*, 10 Sim. 1; *Greene v. Greene*, 3 Ir. [Eq.] Rep. 629, 635, 640.) Words really imperative in sense and unqualified in terms, and equally as strong as those used here, have many times been held insufficient to create legal duties or trusts. (*Stewart v. McDonald*, 37 Hun, 19; Hill on Trustees, 73; *Campbell v. Beaumont*, 91 N. Y. 468; *Lines v. Darden*, 5 Fla. 51, 72; *Winch v. Brutton*, 14 Sim. 359.) A devise expressly made "subject to," etc., raises no trust. (*Parsons v. Best*, 1 N. Y. Sup. [T. & C.] 211; 88 N. Y. 232; *Hutchinson v. Tenant* L. R., 8 Ch. Div. 540; *Spooner v. Lovejoy*, 108 Mass. 529; *Webb v. Wools*, 2 Sim. [N. S.], 267; *Costabadie v. Costabadie*, 6 Hare, 410, 413; *Rose v. Porter*, S. N. East. Rep. 641 and note; *Winch v. Brutton*, 14 Sim. 379; *Abraham v.*

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Ahlman Russ, Ch. 509; *McNab* v. *Whitbread*, 17 Beav. 259.) The "subject" is too uncertain to raise a trust "when the amount given for the purpose is made to depend on the will of the first taker," and such uncertainty is treated by the court "as evidence that the mind of the testator was not to create a trust." (2 Roper on Legacies, 143; 2 White & Tudor's L'd'g Cas. pt. 2, p. 949; *Mackett* v. *Mackett* [L. R.] 14 Eq. 49; 2 Moak's Eng. Rep. 412; id. Am. Notes, p. 1860; Hill on Trustees, 73, 117; 2 Story's Eq. Jur. § 1069; *Mills* v. *Newberry*, 1 N. East. R. 160, 162; *Colton* v. *Colton*, 21 Fed. R. 594, 596; *Lamb* v. *Eames*, 6 L. R., Ch. App. 607; *Curtis* v. *Rippon*, 5 Mad. Ch. 434; *Meredith* v. *Heneage*, 1 Sim. 556, 565; *Buggins* v. *Yates*, 9 Mod. 122, 123; *Cowan* v. *Harrison*, 10 Hare, 234; *Morice* v. *Bp. of Durham*, 10 Ves. Jr., 535, 536; *Wynne* v. *Hankins*, 1 Brown's Ch. 179; *Palmer* v. *Symmonds*, 2 Drewry, 221; *Parnall* v. *Parnall*, 25 Moak's Eng., 801; *Barnard* v. *Minshull*, John's Ch. (Eng.), 276, 287; *Harper* v. *Phelps*, 21 Conn. 257, 269, 270; 1 Redf. on Wills [2d ed.], 718, 719; Lewin on Trusts, 168, 169; Hawkins on Wills [Am. Ed.], 163; *Perry* v. *Merritt*, 18 L. R. [Eq.], 152; 9 Moak's Eng. 702; *Lines* v. *Darden*, 5 Fla. 72, 75, 77; *Gilbert* v. *Chapin*, 19 Conn. 342, 346; *Harper* v. *Phelps*, 21 id. 256, 269, 270; *Bardswell* v. *Bardswell*, 9 Sim. 319; *Tolsen* v. *Tolsen*, 10 Gill. & J. [Md.], 159.) Directions involving a personal trust and discretion can only be exercised by the person named for that purpose. (*Crook* v. *Kings Co.*, 97 N. Y. 421, 453; *Beekman* v. *Bonsor*, 23 id. 298, 304; *Hull* v. *Hull*, 24 id. 647, 651; *Nicholls* v. *Eaton*, 1 Otto, 724, 725; 2 Perry on Trusts, 28; *Costabadie* v. *Costabadie*, 6 Hare, 410, 413; *Gisborne* v. *Gisborne*, 25 W. Rep. [Eng.], 517; *Lytle* v. *Beveridge*, 58 N. Y. 598; *Manice* v. *Manice*, 43 id. 388; Lewin on Trusts, 172.) The words of the seventh paragraph do not raise a "power in trust" (within §§ 95, 96 of the R. S. chap. 1. pt. 4, title 2, on Powers"), because the execution or non-execution is made expressly to depend on the will of the defendant as to the "provision" itself. (*Dominick* v. *Sayre*, 3 Sandf. Supr. Ct.

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R. 555; *Lines v. Darden*, 5 Fla. 72, 75; *Delaney v. McCormick*, 88 N. Y. 174, 182; *Decker v. Saltsman*, 1 Hun, 25; *Munsell v. Lewis*, 4 Hill, 641, 642.) This action is premature. (*Mackett v. Mackett*, L. R. 14 Eq. 49; *Meredith v. Heneage*, 1 Sim. 542, 551; *Gilbert v. Chapin*, 19 Conn. 342, 346; *Parsons v. Best*, 1 N. Y. Supr. Ct. [T. C.], 211; 88 N. Y. 232.)

Henry W. Johnson for respondent. The language used by the testator in reference to his residuary estate is mandatory in its character. (Bouvier's L. Dict. Tit. "To Enjoin" 1 Hale Pl. Cr. 587, 1 East. P. C., 298, 304; Hawk. Pl., C. B., 2 c. 12, § 13; Ry & M. Crim. Cas. 93; Perry on Trusts, § 115; *Meredith v. Heneage*, 1 Sim. 542, 10 Price, 230; *Hoy v. Master*, 6 Sim. 568; *Young v. Martin*, 2 Y. & Cal. 582 [New Rep.]; *Huskisson v. Bridge*, 4 De G. & Sm. 245; *Warner v. Bates*, 98 Mass. 277; *Whipple v. Adams*, 1 Met. 444; *Eaton v. Watts* L. R., 4 Eq. 151.) Where precatory words are used, one of the rules of construction is that the presumption against a trust will not be overcome where the object the property or the way it shall go are left at all in doubt. (*Mackett v. Mackett*, 14 L. R. Eq. 49; *Meredith v. Heneage*, 1 Sim. 542; *Lamb v. Eames*, 10 L. R. Eq. 267; *Reese v. Baker*, 18 Beav. 372; *Winch v. Brutton*, 14 Sim. 379; *Greene v. Greene*, 3 Ir. R. Eq. 629; *Morice v. Bp. of Durham*, 10 Ves.; *Wynne v. Hawkins*, 1 Brown's Ch. 179; *Barnard v. Murshull*, 1 John's Ch. P. [Eng.] 276; *Foose v. Whitmore*, 82 N. Y. 405; *Young v. Martin*, 2 Y. & Col. 582; *Harper v. Phelps*, 21 Conn. 256; *Parsons v. Best*, 1 N. Y. Sup. Ct. [T. & C.] 211.) Where imperative words are used, so that court can see that the testator clearly intended to create a trust, the court will give such effect to the words used as is necessary to carry out the intention of the testator, if possible. (Perry on Trusts, § 114; 1 Jarman on Wills, 332; 2 Redf. on Wills, 415, 421; *Harding v. Glynn*, 1 Atk. 468; *Ware v. Mallard*, 16 Jur. 469; *Warner v. Bates*, 98 Mass. 277; *Forbes v. Ball*, 3 Merivale, 437.) If a valid trust is

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created to the personal estate that is sufficient. (*De Peyster v. Clendening*, 8 Paige, 295; *Dupre v. Thompson*, 4 Barb. 279; *Vail v. Vail*, 7 id. 226; *Irving v. De Kay*, 9 Paige, 521; *Parks v. Parks*, id. 107.) There is no uncertainty as to the nature or extent of the trust created by the will. (*Pierson v. Garnett*, 2 Bro. Ch. Cas. 38; *Harding v. Glynn*, 1 Atk. 469; *Brown v. Higgs*, 4 Ves. 708; 8 id. 561; *Parsons v. Baker*, 18 Ves. 475; *Prevost v. Clarke*, 2 Madd. 458; *Burroughs v. Philcox*, 5 Myl. & Craig, 72; *Dominick v. Sayre*, 3 Sandf. 555; *Ware v. Mallard*, 16 Jur. 492.) The question of intent is the controlling one in the construction of wills, and overrides all others. (*Foose v. Whitmore*, 82 N. Y. 406; *Meredith v. Heneage*, 1 Sim. 550; *Wall v. Langlands*, 14 East. 370; *Jackson v. Housel*, 17 J. & R. 280; *Hone v. Kent*, 11 Barb. 315; *Williams v. Williams*, 1 Sim. [N. S.] 358.)

RAPALLO, J. The grandfather of the plaintiff (Chauncey L. Cooke), by the sixth and seventh clauses of his will, which took effect in December, 1878, devised and bequeathed his residuary estate as follows:

"VI. The residue of my estate, both real and personal, of whatever name or kind, I give, devise and bequeath to my daughter, Sara L. Cooke, to have and to hold the same unto her and her heirs and assigns forever."

"VII. I commit my granddaughter, Annie C. Lawrence, child of my daughter Annie, now deceased, to the charge and guardianship of my daughter, Sara L. Cooke, in whose honesty, good will and integrity, I repose the utmost confidence. I enjoin upon her to make such provision for said grandchild out of my residuary estate now in her hands, in such manner, at such times, and in such amounts as she may judge to be expedient and conducive to the welfare of said grandchild, and her own sense of justice and christian duty shall dictate."

The complaint alleged, that in the month of March, 1880, and in the month of January, 1881, the plaintiff, through her general guardian, who was her father, requested the defendant to make, out of the estate so devised and bequeathed to her,

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provision for the plaintiff, but that the defendant had neglected and refused so to do; and demanded judgment, that by the terms of the will a trust was imposed upon the defendant in favor of the plaintiff; that the defendant render an account of the residuary estate and the income thereof, and that the court should determine and make such provision for the plaintiff out of said residuary estate as should be conducive to the welfare of the plaintiff, and that a receiver should be appointed of such residuary estate, etc.

The defendant, by her answer, denied that any trust was created by the will, but also denied that she had refused to make provision for the plaintiff. She admitted the full force of the moral considerations in favor of the plaintiff arising from the will, and averred that she intended and had always intended fully and in good faith, to comply with the same.

The action was tried at Special Term before LAWRENCE, J., who held that no trust was created by the clause referred to, and that the defendant took, under the will of her father, an absolute title to his residuary estate, and he dismissed the complaint. His judgment was reversed at the General Term, and a reference was ordered to ascertain the amount of the residuary estate and report what provision should be made for the plaintiff out of such residuary estate. The referee reported the proof taken before him, and that in his opinion the sum of \$1,080 per annum would be a proper provision to be made for the plaintiff until she should attain the age of fourteen years. This report was confirmed by the court, and judgment was rendered that the defendant pay that sum to William H. Lawrence, the father and general guardian of the plaintiff until the further order of the court.

Full and exhaustive opinions were delivered both at Special and General Terms, in which the authorities bearing upon the question are reviewed at length. Without going over the ground covered by those opinions, we deem it sufficient to say that we concur in that of LAWRENCE, J., at Special Term, which was to the effect that the defendant took an absolute title to the residuary estate, and that the provision to be

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made for the plaintiff was left wholly to the discretion of the defendant.

The opinions at General Term were by BRADY and DANIELS, JJ.; DAVIS, P. J., delivering a brief dissenting opinion. The prevailing opinions rest upon the word "enjoin," used by the testator in clause VII. If the clause had been that the testator enjoined upon the defendant to make suitable provision, out of the residuary estate, for the support of the plaintiff, there would be force in the argument, not indeed that the defendant took the residuary estate in trust, but that she took it subject to a charge, the amount of which might be ascertained by a court of equity, and satisfaction thereof decreed. But such is not the language of the will. It is, "I enjoin upon her to make *such provision* for said grandchild, out of my residuary estate, *in such manner, at such times and in such amounts* as she may judge to be *expedient* and conducive to the welfare of said grandchild." She might, under the broad discretion thus conferred upon her, deem it best for the grandchild to wait until she should become of age, and then give her a portion of the estate, or otherwise provide for her. There was nothing in the will which required her to provide for the support of the grandchild during her minority. She was living with her father, out of the State. No obligation was imposed upon the defendant by her father's will, to indemnify the father of the plaintiff for her support, or to furnish him with means therefor. The provision in the will was not intended for the benefit of the father of the plaintiff, nor to relieve him from his legal obligation to support his own child. All these matters were left wholly to the discretion of the defendant, uncontrolled by any consideration except, to use the language of the testator, what "her own sense of justice and christian duty shall dictate." It was the will of the testator that the defendant should be the sole judge of the manner in which provision for the plaintiff should be made, at what time it should be made, and to what amount. It was beyond the power of any court to substitute

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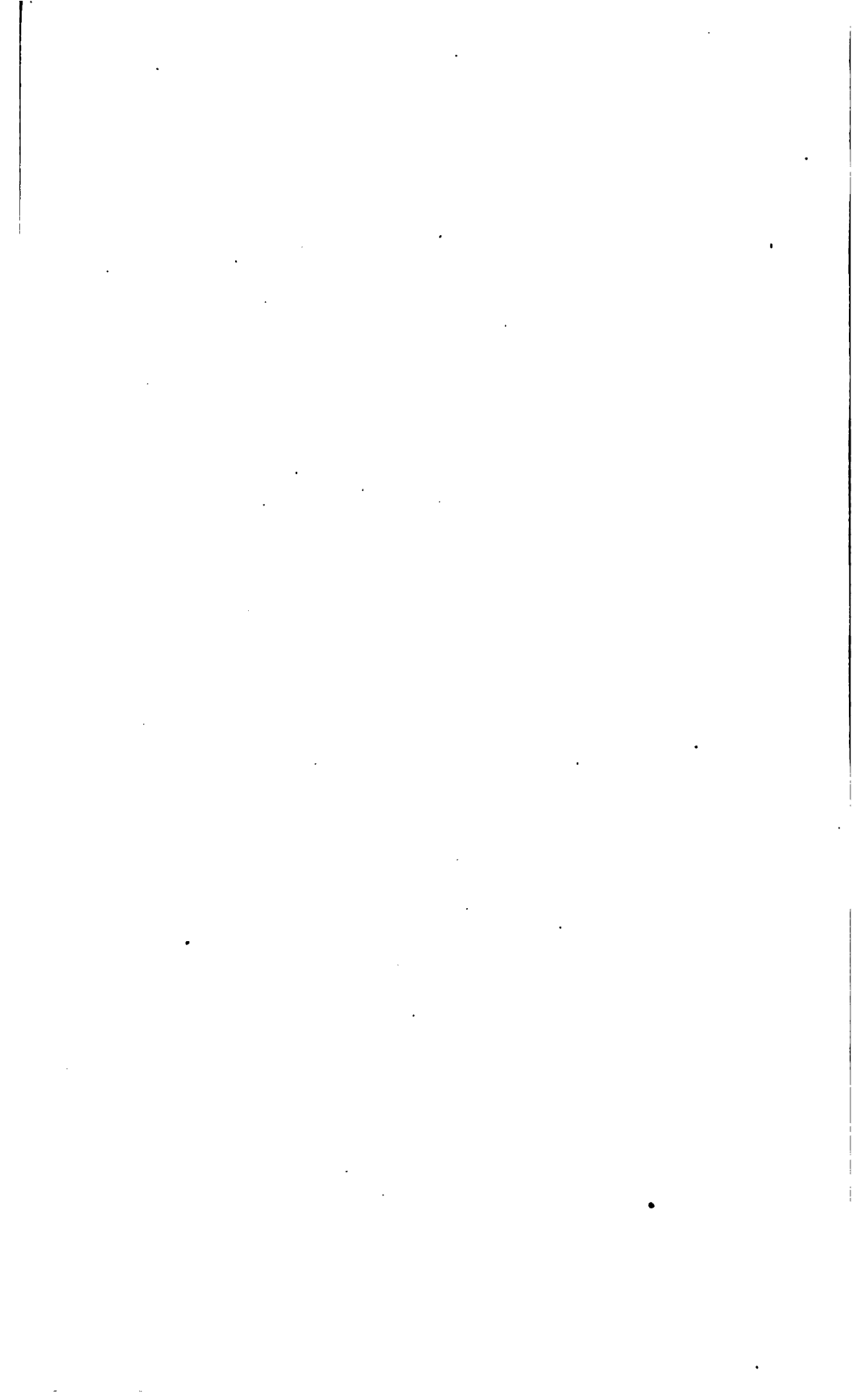
its discretion for hers, and no trust was created which a court of equity could execute, contrary to her judgment.

The moral obligation imposed on the defendant is very strong. The plaintiff is the representative of the deceased sister of the defendant, and if the testator had died intestate plaintiff would have been entitled to one-third of his estate. For reasons of his own, however, the testator preferred not to permit any title to any part of his estate to vest in his grandchild, but to leave entirely to the discretion of the defendant what portion she should take, in what manner, and at what time. He, therefore, vested the absolute title to his residuary estate in the defendant, enjoining upon her only the duty of exercising this discretion, and expressing his conviction that she would do so honestly and fairly. She recognizes this moral obligation and avers her intention of performing it. It is not for the courts to repudiate the confidence which the testator chose to repose in the defendant, and to assume a power which was not intended to be exercised by them, by determining in what manner, at what time and to what amount the provision shall be made.

The orders of the General Term and subsequent proceedings should be reversed and the judgment of the Special Term dismissing the complaint affirmed with costs.

All concur.

Ordered accordingly.



MEMORANDA

OF THE

CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS
VOLUME, AND NOT REPORTED IN FULL.

SAMUEL D. HINMAN, Respondent, *v.* WILLIAM H. HARE,
Appellant.

(Argued March 17, 1886; decided January 18, 1887.)

As a majority of the court did not concur in the opinion
written in support of the decision, this case is not reported.

Stephen P. Nash and *Samuel Hand* for appellant.

Haley Fiske and *William Henry Arnoux* for respondent.

EARL, J., reads for reversal and new trial; RUGER, Ch. J.,
concurs; RAPALLO and ANDREWS, JJ., concur in result;
DANFORTH, J., reads for affirmance; FINCH, J., concurs.

Judgment reversed.

JACOB H. CONKLIN et al., as Trustees, etc., Appellants, *v.*
GARRET Z. SNIDER, as Executor, etc., et al., Respondents.

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104	641
Case 2	
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Where an order of General Term, reversing a judgment and granting a
new trial, is affirmed on appeal to this court, the stipulation given on
appeal compels an award of judgment absolute against the appellant,
although it appears he was entitled to part of the relief granted by the
judgment.

It is only where the error which might have justified a reversal of the
judgment was merely incidental and capable of accurate correction,
and so the judgment should have been corrected below without the
award of a new trial, that this court may modify the judgment by cor-
recting the error.

(Argued November 22, 1886; decided January 18, 1887.)

SICKELS — VOL. LIX. 81

THE following is the *mem.* of opinion in this action :

"While we do not agree with all the reasons given by the General Term for its order of reversal and award of a new trial we feel bound to affirm that order. The action was brought to reclaim for a trust estate several groups of real property alleged to have been purchased by the trustee in his own name as an individual, but with the trust funds. The referee found in favor of the plaintiffs, determining that all the lands described in the complaint belonged to the trust. On appeal, the General Term reversed the judgment, assigning as reasons that the testimony of one of the parties to personal conversations with a deceased testator was improperly admitted, and that the trust funds were not satisfactorily traced by the evidence into any of the lands referred to. We think the testimony of Cooper was not offered or given in his own behalf and was admissible, and that the evidence very fully and fairly demonstrated that a portion of the lands, known in the case as the Brooklyn property, did belong to the trust estate, but that as to the rest of the property the proof fell far short of the certainty and definiteness required. It is not needful to explain the grounds of our opinion, so far as it differs from that of the General Term, because if that of the latter had been identical with our own, it would still have been the duty of the court to have reversed the judgment of the referee and awarded a new trial for the error committed as to the property other than the Brooklyn lands. We cannot say, therefore, that the order of the General Term was erroneous. Possibly it might have made an alternative order permitting the plaintiffs to limit their judgment to the Brooklyn lands, and on their stipulating so to do, affirming the judgment as modified, but that was matter of discretion, and it was not error instead to award a new trial. The defeated plaintiffs were beaten for lack of evidence and were entitled to an opportunity to strengthen their case in any of its parts, for the decision left a recovery by them possible. The order of the General Term having been a proper one we cannot reverse, but must affirm it, and the plaintiff's stipulation on the appeal to this court, compels

an award of judgment absolute against them. We have once or twice, in cases where the error which might have justified a reversal was merely incidental and capable of accurate correction, modified the judgment by correcting the error, but those were instances in which we thought a new trial ought not to have been awarded (*Wright v. Nostrand*, 98 N. Y. 669), since there could be no recovery for what had been erroneously allowed. Here such a recovery was possible, and the award of a new trial was a proper order for the General Term to make, and we must affirm it and order judgment absolute, although we can see that plaintiffs might have been entitled to a part of their relief. (*Gray v. Bd. of Supervisors*, 93 N. Y. 603, 608; *Thomas v. N. Y. Life Ins. Co.*, 99 id. 250; *Godfrey v. Moser*, 66 id. 250.) They chose to take the peril of their stipulation.

"Order of General Term affirmed, and judgment absolute directed against plaintiff."

William J. Hardy for appellant.

Irving Brown for respondent.

FINCH, J., reads for affirmance of order of General Term and for judgment absolute against plaintiff on stipulation.

All concur.

Order affirmed and judgment accordingly.

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GEORGE R. ALEXANDER, Appellant, v. SAMUEL G. ALEXANDER, Respondent.

A party may not receive and accept the amount awarded to him by a judgment and appeal therefrom; and when, after an appeal has been brought, he thus accepts the benefit of the judgment, he thereby waives the appeal.

(Argued November 28, 1886; decided January 18, 1887.)

THIS was an appeal from an order of General Term denying a motion to dismiss the appeal thereto

The action was for partition, between heirs-at-law.

The following is the opinion :

"The motion to dismiss this appeal is founded upon the fact that the appellant, who was defendant in an action of partition, and by the judgment rendered was awarded a proportion of the proceeds resulting from a sale ordered by the court, accepted those proceeds after his appeal was perfected, and took also the costs allowed to him by the judgment. His notice of appeal was served March 13, 1886, and the referee appointed to make the sale swears that he paid the share awarded to the defendant by two checks, dated, respectively, the seventeenth and twenty-fourth of the following April, both of which have been paid by the bank upon the defendant's indorsement. It is not denied that he could not be permitted at the same time to take the fruit of the judgment, and appeal from it as erroneous or wrong, but it is contended in the present case that no such inconsistency exists because the whole controversy concerns a fund other than the residue, a share of which the defendant accepted ; or, in substance, that what the defendant took he would be entitled to retain in any conceivable disposition of the case. (*Clowes v. Dickenson*, 8 Cow. 328; *Knapp v. Brown*, 45 N. Y. 207.) We are not able to concur in a view of the situation which would make those authorities applicable. The litigation involved a question of advancements. The court found that \$57,500 had been advanced to the defendant and \$15,000 to the plaintiff; and awarded to the latter the difference of \$42,500 to be first paid out of the proceeds of sale for equality of partition, dividing the residue equally between the two parties. The defendant's notice of appeal is from the interlocutory and the final judgment, and not from any alleged separable or independent portion which left the rest unaffected and unassailed. So far as the division of proceeds is concerned we cannot discover any such separable or independent portion to which the appeal could have been limited. The amount of the residue must necessarily depend upon the amount of the advancements adjudged to have been made. Those to the defendant are alleged in the complaint to have consisted of certain parcels of real estate the value of which is not stated and which value necessarily became

the subject of proof. If the judgment should be reversed, the plaintiff on a new trial will be at liberty to show, and may possibly establish, that such value was greater than the \$57,500, or that the advancements to himself were less than the \$15,000, and in either event the sum first payable to him from the proceeds would be increased, and as a consequence defendant's share of the residue lessened. He stands thus in the attitude of holding the fruit of the judgment to which he may not be entitled if his appeal succeeds, and yet persisting in his appeal. The trouble is that he cannot gain the right to recover more without incurring the hazard of recovering less.

But it is further insisted that he took his share of the residue with the plaintiff's consent, and under an arrangement which, nevertheless, contemplated the prosecution of the appeal. The proof of this is sought to be deduced from an affidavit of the defendant's attorney. He swears that just before the entry of judgment he declared his client's purpose to appeal, and thereupon the plaintiff's attorney expressing a desire not to have proceedings stayed, and to be at liberty to collect and receive the sum awarded, it was finally agreed that he might do so upon assigning to the referee in trust a mortgage as security for any restitution which might be ordered. That assignment, and a covenant of restitution, were executed April 1, 1886, and after the appeal had been taken. The affidavit further showed that the plaintiff's attorney frequently said that there was no need of tying up the proceeds of the sale, but that a speedy sale and distribution was desirable. It is to be noticed that the affidavit asserts no negotiations except as to the right of the plaintiff to get his money and to prevent a stay, which would hinder that result; and does not claim that anything was said, or any agreement made, relating to the share awarded to the defendant. It shows only that the plaintiff wanted his money, that he could not get it if the defendant, on his appeal, effected a stay of proceedings; that security was given to obviate the need of that stay, and what was said about not tying up proceeds, and expediting the appeal, naturally referred to that negotiation and related to that effort. The defendant's silence as to his own share is

made more emphatic by the affidavit of the plaintiff's attorney that he never uttered a word about defendant's treatment of the residue awarded to him, or in any manner recognized the appeal after that share was accepted. It is not possible to infer a consent or waiver. The defendant does not claim that his act was inadvertent and without consciousness of the question it might raise. If he did that, and offered to restore the money received to its official custodian, pending the appeal, the question would assume a more hopeful shape. But he stood, and stands here, upon his right. While we cannot help thinking that some misunderstanding has existed, and should be glad to sustain the appeal taken, we can find no just ground upon which to rest such a decision.

The order of the General Term should be reversed and the appeal dismissed, with costs."

J. T. Marean for appellant.

Nathaniel C. Moak for respondent.

FINCH, J., reads for reversal of order of General Term, and for dismissal of appeal to that court.

All concur.

Ordered accordingly.

ANN E. MONFORT, Administratrix, etc., Respondent, v. THE
LONG ISLAND RAILROAD COMPANY, Appellant.

(Argued December 9, 1886; decided January 18, 1887.)

Edward E. Sprague for appellant.

Henry A. Monfort for respondent.

Agree to affirm; no opinion.

All concur except RAPALLO, EARL and FINCH, JJ.,
dissenting.

Judgment affirmed.

EDMUND S. HAMILTON et al., as Executors, etc., Respondents,
v. CASSIUS H. REED et al. Appellants.
SAME, Respondents, v. SAME, Appellants.

(Submitted December 8, 1886; decided January 18, 1887.)

Christopher Fine for appellants.

Platt & Bowers for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

JAMES J. O'DEA, as Administrator, etc., Appellant, v. JAMES
A. NORCROSS et al., Respondents.

(Argued December 9, 1886; decided January 18, 1887.)

E. Countryman for appellant.

Nathaniel C. Moak for respondents

Agree to affirm ; no opinion.

All concur except DANFORTH, J., not voting.

Judgment affirmed.

HANNAH ALEXANDER, as Administratrix, etc., Respondent, v.
EMMA A. SUMNER, Appellant.

(Argued December 10, 1886; decided January 18, 1887.)

William W. Badger for appellant.

Josiah T. Marean for respondents.

Per Curiam mem. directing the entry of an order reversing the judgment and directing a new trial, with costs to abide event, unless plaintiff stipulates to deduct therefrom a credit

of \$122.50 and interest and the costs embraced therein, and to pay the costs of the appeal to this court, in which case the judgment, as modified, is affirmed without costs to plaintiff.

All concur.

Ordered accordingly.

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In the Matter of the Judicial Settlement of the Accounts of
ASA BIGELOW KELLOGG, as Executor, etc.

An appeal to this court from an affirmance by the General Term of a surrogate's decree, upon trial of an issue of fact, brings nothing here for review not presented by appeal to the General Term, and, upon appeal to the General Term, no finding or decision can be reviewed that was not excepted to. (Code of Civ. Pro. § 2545.)

Prior and up to the death of a testator, K., his executor was his general agent. As such he placed in the hands of an attorney a claim for collection. The attorney was directed by the testator to pay the proceeds to K., this he did by sending a check for the avails of collection to the office of K., payable to his order. The testator died on the same day, after the delivery of the check. Two days thereafter K. drew the money on the check and credited it in his account with the testator, which prior to the credit showed a balance due K. The testator died insolvent. *Held*, that the surrogate properly allowed the credits; that when the check was delivered K. could treat it as funds in his hands to be applied, so far as needed, in payment of what the testator then owed him, and when the money was drawn upon the check the payment related back to the delivery of the check, and he drew it as payee, not as executor.

Where objection to a claim paid by an executor that it was barred by the statute of limitations at the time of payment was not taken upon settlement of the executor's accounts, it may not be raised on appeal.

Indorsements of payments upon a note, made by the holder at a time when it was against his interest to make them, are *prima facie* evidence of the payments.

Upon settlement of the accounts of an executor the surrogate improperly charged him with an item of \$11,000 and credited him with the amount of a claim against the estate which he had paid in full. The General Term, on appeal, struck out the erroneous charge, and as this left the estate insolvent, readjusted the account by disallowing the over payment. *Held*, that the General Term had the right to so modify the decree instead of sending it back for a rehearing before the surrogate. (Code of Civ. Pro. § 2587.)

THIS was an appeal from a judgment of the General Term, modifying, and affirming as modified, a surrogate's decree on final settlement of the accounts of an executor.

The following are extracts from the opinion :

"(2.) During the lifetime of the testator for some years prior to his death, the executor was the general agent of the testator, having the general management of his business, and, as such, he placed in the hands of an attorney a claim against one Schuyler for collection. Suit was brought upon it and the attorney some time before the death of the testator collected \$6,500. From that sum he deducted \$500 for his services, and afterward, on the tenth day of October, while the testator was still alive, he drew his own check upon a New York bank for the sum of \$6,000, payable to the order of Asa B. Kellogg, the executor, and sent it to his office in the city of New York, and it was there delivered to some person who was in charge of the office before the testator's death with directions to telegraph its delivery to the executor who was then with the testator at Greenbush. The testator died the same day, and on the twelfth day of October, the executor drew the money on the check, and credited it in his account with the testator. After such credit there was still a balance due from him to the testator with which he charged himself on the accounting. The surrogate allowed the \$6,000 as a credit in the account of the executor as claimed by him. But some of the appellants claimed that sum should have been charged to the executor as if he had actually received the check after the testator's death, and that the courts below erred in not so charging it.

"We are of opinion that none of the appellants are in a position to claim any error here as to this item. Mrs. Akin, the widow, neither excepted to the finding of the referee nor appealed to the General Term. The general guardian of the infant appellants appealed, but did not except to any of the findings or decisions of the surrogate; and the special guardian of the infants filed exceptions, but did not appeal to the General Term. An appeal to this court from an affirmance by the General Term of a surrogate's decree brings nothing here

for review where there was no appeal to the General Term, and upon an appeal from a surrogate's decree no complaint can be made of any finding or decision which has not been excepted to. (Code, sec. 2545.)

"But for a further reason we think there was no error in reference to this item. The money, when collected, was deposited by the attorney in his bank account, and hence he became a debtor to the testator for that sum. He had been directed by the testator to pay it when collected to the executor as his agent. He made such payment by his check, and when the check was delivered at the office of the executor for him to some one there in charge, it was delivered to him and operated as a payment *sub modo*. He could then treat it as funds in his hands to be applied so far as needed in payment of what the testator then owed him. When the money was drawn upon the check, the payment related back to the delivery of the check. He did not draw the money as executor, but as payee of the check and he could not, therefore, in law or equity be compelled to account for the check except by first applying it upon what the testator owed him in current account.

"(3.) At the time of the death of the testator, his widow held a note for \$5,000 against him, given for borrowed money dated March 17, 1870, upon which there were indorsed the following payments: \$350, March 17, 1873; \$350, March 17, 1874; \$350, March 17, 1875; \$300, March 17, 1877, and \$200, Dec. 8, 1880. It was proved that the indorsements were made by Mrs. Akin at their dates. The note had been presented to the executor as a claim before the accounting and admitted by him, and he had made payments upon it. The objection is now made by some of the appellants that the note was barred by the statute of limitations, and that the surrogate erred in ordering the executor to pay it. To this there are several answers. The only objection filed to this note before the surrogate was that it had been paid, and the statute of limitations does not appear to have been mentioned during the trial. The objection that the note was barred, should not, therefore, prevail here. The executor had admitted the claim upon the note, and in doing that he acted for and represented all the persons interested in the estate.

The admission implied that the note had not been paid, and that by payments made thereon it had been kept in life, and so, upon the admission alone, in the absence of countervailing evidence, fraud or collusion, the surrogate was authorized to find. But proof that the indorsements were made at their dates was sufficient to authorize the surrogate to find, and required him, in the absence of conflicting evidence, to find that the note had been kept in life by payments actually made. The indorsements were all made while the note was in life, and when it was against the interest of the holder to make them unless true. It matters not that the last two payments were made after the lapse of six years from the date and maturity of the note. It is the fact and that alone that it was against the interest of the holder to make such indorsements that makes them *prima facie* evidence of payments. (*Roseboom v. Billington*, 17 Johns. 182; *Risley v. Wightman*, 13 Hun, 163; *Hulbert v. Nichol*, 20 Hun, 454.)

"(4.) It is claimed, on behalf of the executor, that his evidence, as to the payment of \$390 to the testator, was improperly excluded and that he was thus erroneously deprived of a credit for that sum. The payment was a personal transaction with the testator and hence, under section 829 of the Code, he was incompetent to prove it. We cannot be certain, from an examination of all the evidence, that the executor, by his previous examination on behalf of the contestants, had been rendered competent to testify as to the payment, and in view of the small difference the allowance of this credit would make in the final result we are constrained to hold that the surrogate did not err in reference thereto.

"(5.) The executor claims that the General Term erred in its modification of the surrogate's decree and that it should have sent the case back to the surrogate for a rehearing. By the finding of the surrogate that the executor was chargeable with his note for upwards of \$11,000 the estate of the testator was shown to be solvent, and there was enough to pay all the debts in full. But when the General Term, upon the claim of the executor, struck out the note as a charge against him the estate was shown to be insolvent, and then it appeared that the executor had made an overpayment to one of the

creditors, whom he had paid in full. In readjusting the account the General Term disallowed this overpayment, and in this no error was committed. Objection to the overpayment was distinctly made before the surrogate. The General Term had power to reverse, affirm or modify the decree appealed from. (Code, § 2587) All the elements for the modification appeared in the findings of the surrogate and it had the power to render such a judgment as the surrogate should have entered. The only error found by the General Term was the charge against the executor of his note for upward of \$11,000 and interest, and the only modification of the surrogate's decree was that made necessary by the disallowance of that charge, and that modification the General Term was competent to make."

L. Laflin Kellogg for *A. B. Kellogg*, appellant

Arthur H. Smith for *S. A. Kellogg*, respondent and appellant.

Matthew Hule and *Ward & Cameron* for *A. A. Akin* respondent and appellant.

EARL, J., reads for affirmance.

All concur.

Judgment affirmed.

KATE E. SHERRY, as Administratrix, etc., Appellant, v THE
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD
COMPANY, Appellant.

(Argued December 15, 1886, decided January 18, 1887)

This action was brought to recover damages for alleged negligence, causing the death of plaintiff's intestate, who was killed while crossing the tracks of defendant's road at Little Falls. Plaintiff was nonsuited on the trial on the ground of contributory negligence on the part of the deceased.

The following is the opinion in full.

"The learned counsel for the respondent at the opening of

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his argument, conceded that he was bound to assume, for all the purposes of the case, that upon the occasion in question the defendant omitted to give the statutory signal of its approach. It was therefore, in fact and in law, guilty of negligence. But although the bell was not rung, or the whistle sounded, it was still the duty of one traveling on the street crossed by the railroad to exercise care and diligence to discover whether a train was about to pass, and if she failed to do so, or if seeing the approaching train, she nevertheless undertook to cross, she was guilty of negligence, and in either case, if injured, so contributed to the accident that she can have no just cause of action. To determine, however, whether a complaining party is within this rule of exclusion, or whether her conduct, in a given case, was consistent with reasonable and ordinary care, all the circumstances surrounding the transaction are to be examined. Usually, therefore, the question is for the jury, and only in exceptional cases can the court answer it. The court may dispose of the case, and it is its duty to do so when no facts are in dispute, or any weighing of testimony necessary

“The case before us was disposed of by the trial judge as one of that character, and the appeal questions the correctness of his decision. The appellant here was plaintiff in the action. Her intestate, Charlotte Briggs, was struck and killed by the defendant's locomotive engine at the railroad crossing of Fifth street in the village of Little Falls, between two and three o'clock in the afternoon of October 4, 1883. The railroad of six tracks crosses the street upon a curve, but nearly at right angles. It afforded protection by neither flagman nor gate, and upon the occasion in question its train came from the west upon the crossing, out of time, at the speed of thirty miles an hour, sounding neither bell nor whistle, and, so far as appears, without other warning of its approach. Between Fifth street and the west were various obstructions to the view, a ledge of rocks separating two of the tracks from the other four, and the fences of a cattle yard extending up to the west line of Fifth street. On this occasion there were also box cars of the defendant's upon a side track, just west of the crossing, and which cut off the

view until the wayfayer had actually reached the main track.

"The curve was of such a radius that, although when on the tracks a person could, according to her position, see an approaching train at a distance of from five hundred and eighty to six hundred and forty-five feet, she could, under the most favorable circumstances, identify the track over which it moved at but from four hundred to four hundred and forty feet. There was much wind at the time, and south of the railroad and in its vicinity were mills and factories whose machinery created considerable noise.

"The woman came along Fifth street to the crossing, passed over two tracks and through the intervening space by the box cars to the most northerly or fourth of the four tracks, and passing on had reached No 1, or the most southerly, when she was struck and killed. In deciding the motion for a non-suit the court held that, under the circumstances in evidence, it would be a question for the jury whether 'she may not have exercised her hearing — may not have listened and still not have heard the train; that whether she could have seen the train from the open space, or from the most northerly of the four tracks' was also for the jury, saying: 'Upon the evidence here the jury would have a right to find that there were box cars there, and that her view was impeded somewhat by those, so they might find she could not see upon the track until she passed to the southerly edge of that siding or stepped over the rail.'

"Nor did the learned judge think that it could be said, as matter of law, that she did not look while on the railroad after passing the point up to which she could not see.

"From that point, where the view was unobstructed by the box cars across the road, to the rail of track number one, where she was killed, was thirty-two feet and two inches; it was covered by the defendant's tracks; she was upon them, and the argument is that if she looked she must have seen the approaching train, and during that time had the ability to save herself by keeping off the track number one 'I am hardly willing,' says the learned judge, 'to say that, whether she looked or not, might not be a question for the jury. What I do think is that she had no right to pass over that

thirty-two feet and two inches and go upon that track with the train in full view coming towards her; and when she did it, she did it either from a thought that she could get over in safety before the train struck her, and made a miscalculation, and if she did, that is negligence, because when she saw the train coming, her duty was not to attempt to get past before the train came, but to wait; and if she took the chances, she took the chance of her death, without holding the defendant liable.'

"Upon this ground the nonsuit was granted, and upon this ground the learned counsel for the respondent contends that it should be sustained. Certainly upon the evidence there is no other. In approaching the railroad and entering upon its group of tracks, the jury might well find that the traveler exercised as much diligence as a prudent person would exercise under the circumstances, having regard for her own safety and fairly endeavoring to perform her duty. This, under the rulings of the trial judge, was the law of the case. She undoubtedly came into a place of danger the instant her foot touched the road-bed of the defendant, but the omission of the defendant to obey the law, and give notice of the running train, was an assurance of safety, and that no locomotive engine was within eighty rods of the place where she then lawfully was. That omission was not only negligence and a violation of a statutory duty on the part of the defendant, but it also bears upon the conduct of the plaintiff, and must affect any estimate of the amount of care she should have observed.

"Nor did the court hold that she did not look or observe after reaching the tracks. She is charged with having seen the train before she reached the track where she was killed. The evidence permits the inference that before reaching the middle of the four tracks the train could not be seen, and might not be heard, and when first in view that it would be difficult to determine on which of the four tracks it was moving. One L. passed over the same crossing just a little ahead of Mrs. Briggs. He first saw her as he was going upon the track from the north, she then being twenty feet behind him. He passed completely over the railroad and reached

the south side of all the tracks when he first heard the train approaching ; he heard the noise but could not see the train. ' After hearing the train,' and while standing within four feet of the first track, he says, ' I saw the old lady between tracks two and three.' C., being south of the crossing, saw her coming from the north towards and upon the four tracks. ' Before going on she raised her head up,' he says ; ' as the train rounded the curve the old lady was somewhere between tracks two and three, coming south, facing me ;' and adds, ' from the point where the old lady was when the train rounded the curve the track upon which a train approaching from the west is coming cannot be determined without you are familiar with the tracks ; the track the train is approaching on cannot be seen. I next,' he says, ' saw the old lady between tracks one and two ; I then saw her throw up her head and quicken her pace ; she was coming to the south ; my attention was called to the train as it came down between Fifth and Sixth streets ; it was blowing off steam ; I noticed the smoke ; it was a cold, windy afternoon ; the wind was blowing from the west ; from where I stood I could see this steam and smoke ; the wind blew it to the ground facing the engine ; it blew it down in front of the engine ; the old lady at that time was between tracks one and two.'

" At that time also a train was coming from the east, and on the crossing just south of the railroad, the witness L. was preventing, with some difficulty, another woman drawing a little wagon from entering upon the railroad.

" There is other evidence bearing upon these circumstances, and in reviewing the propriety of a nonsuit, the appellant is entitled to have all of it construed in a manner most favorable to her contention. (*Harris v. Perry*, 89 N. Y. 308.)

" We think it cannot properly be said, as matter of law, that the intestate was in fault. By the sudden appearance of the locomotive she was called upon to determine whether she should stand still or go north or south, north to retreat, or south to get over the tracks. If, as is assumed, she saw the locomotive, it may also be inferred that she was ignorant as to which track it was upon ; the configuration of the tracks, the wind driving before the locomotive its steam and smoke,

might well tend to disturb her judgment; the noise of the mills, the fracas with the woman whose course was interrupted, the train coming from the east, even the very number of the tracks, might add to her confusion. Determine she must, and that instantly, between these hazards. It cannot be said, as matter of law, what a prudent and reasonable person would have done in circumstances similar to those in which the intestate was placed. For aught she could see there was possible danger in each direction and her present position one of jeopardy. A jury alone can determine what was her duty and how far it was performed. These things were to be ascertained as facts, and the principle embodied in the maxim: '*Ad questiones facti non respondent iudices*' has full application. (*Wasner v. Del. etc., R. R. Co.*, 80 N. Y. 218; *Beiseigel v. Same*, 34 id. 622; *Greany v. Long Island R. R. Co.*, 101 id. 419.) We think the court erred in taking the case from the jury.

"The judgment should, therefore, be reversed and a new trial granted, costs to abide the event."

George F. Crumby for appellant.

U. D. Prescott for respondent.

DANFORTH, J., reads for affirmance.

All concur.

Judgment affirmed.

CHRISTIAN BRECHT, as Administrator, etc., Appellant, v.
H. CLAUSEN & SON, BREWING COMPANY, Respondent.

(Argued December 15, 1886; decided January 18, 1887.)

Henry Wehle for appellant.

Samuel Untermeyer for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

MARY M. McGRATH, as Administratrix, etc., Appellant, v. THE
BROOKLYN CITY RAILROAD COMPANY, Respondent.

(Submitted December 7, 1886; decided January 18, 1887.)

Carpenter & Roderick for appellant.

Morris & Pearsall for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

JOHN BELL, Respondent, v. JOHN B. SMITH, Appellant.

(Submitted December 7, 1886; decided January 18, 1887.)

L. A. Gould for motion.

A. J. Fransioli opposed.

Agree to grant motion to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

In the Matter of the Application of ALLAN CAMPBELL,
Commissioner, etc.

(Argued January 18, 1887; decided January 25, 1887.)

Hamilton Wallis for appellant.

Frank E. Smith for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

ALONZO BRADNER et al., as Executors, etc., v. LAUREN C.
WOODRUFF et al., Surviving Trustees, etc.

In the Matter of the Petition of NICHOLAS JOHANTGEN, Respond-
ent, v. REUBEN WHITEMAN, Receiver, etc., Appellant.

(Argued January 18, 1887; decided January 25, 1887.)

Martin W. Cooke for appellant.

Theodore Bacon for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

CHARLES P. DE GRAFF et al., Respondents, v. PATRICK H.
CUMMINS, Appellant.

(Argued January 18, 1887; decided January 25, 1887.)

M. L. Stover for appellant.

W. L. Van Denbergh for respondent.

Agree to affirm ; no opinion.

All concur.

Order affirmed.

THE PEOPLE OF THE STATE OF NEW YORK v. THE BANK OF
DANSVILLE.

In the Matter of the Petition of GEORGE ENGER et al.,
Respondents.

(Argued January 18, 1887; decided January 25, 1887.)

Martin W. Cooke for appellant.

Charles J. Bissell for respondent.

Agree to affirm ; no opinion.

All concur.

Order affirmed.

SARAH J. CRESHULL, Appellant, v. CATHARINE MUILEN,
Respondent et al.

(Argued January 18, 1887; decided January 25, 1887.)

THE following is the *mem.* of opinion herein :

" On the 21st of July, 1886, the plaintiff gave notice to the clerk of the City Court of Brooklyn, and to Messrs. Morris & Pearsall, attorneys for the defendant, that she appealed to the Court of Appeals from an order of the General Term of the City Court, which affirmed an order of the Special Term of that court, granting a motion made by the defendant for a new taxation of costs. It was made, as the order recites, upon all the papers in the action, and directed that the defendant be allowed, in addition to her costs as taxed by the clerk, \$30 for a trial fee, and \$10 additional, because the trial occupied more than two days. The plaintiff appealed to the General Term, where the order was affirmed.

" The papers referred to in the notice and in the Special Term order as papers in the case, are not before us. It appears, however, as claimed by the appellant, that on the 26th of May, 1886, before the hearing of the appeal at General Term, a brief memorandum containing an extract from the judgment and the defendants' costs as taxed by the clerk, was indorsed by the attorneys for the respective parties in these words : ' Approved and assented to, as and for papers on appeal.' The appellant here was the appellant in the court below. The memorandum may be presumed, therefore, to contain all that in the opinion of her counsel was material to present the question intended to be raised. It shows nothing which, standing by itself, or which, with reference to any other matter in the appeal book, makes the objection of the

appellant intelligible. We discover no reason why the order appealed from should not be affirmed.

"Order affirmed, with costs of appeal in this court to be paid by the appellant to the respondents' attorney."

P. V. R. Stanton for appellant.

Samuel D. Morris for respondents.

Per Curiam mem. for affirmance.

All concur.

Order affirmed.

ESTELLE D. BOWERS, Respondent, *v.* FREDERICK C. DURANT
et al., Appellants.

(Submitted January 18, 1887; decided January 25, 1887.)

Carlisle Norwood, Jr., for appellants.

John M. Bowers for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

MICHAEL J. DERLETH, Respondent, *v.* HENRY D. DE GRAFF
et al., Appellants.

An appeal may not be taken to this court from an order of General Term affirming a judgment; so, also, where there is both an appeal to the General Term from a judgment and from an order denying a motion for a new trial, and the judgment and order are affirmed, an appeal is not authorized from so much of the order of affirmance as affirms the order denying a new trial. Such an appeal brings no question before this court not involved in an appeal from a judgment entered on the General Term order. Judgment should first be entered on such order and an appeal taken from that.

(Submitted December 7, 1886; decided January 25, 1887.)

104	661
121	64
B	661
123	130

104b661
150 228]

THE following is the *mem.* of opinion herein :

" At a prior term of this court a motion was made to dismiss the appeal in this case upon the ground that it was unauthorized, and that motion was granted. This is a motion for a reargument of the prior motion. We have carefully reconsidered the matter, and are of opinion that no error was committed.

" The action was tried before a jury and a verdict rendered in favor of the plaintiff. After the verdict the defendants made a motion before the trial judge upon his minutes for a new trial, and an order was entered denying that motion. Judgment was then entered in favor of the plaintiff. Thereafter a case containing exceptions was settled and the defendants appealed to the General Term from the judgment and also from the order denying a new trial, and the General Term affirmed both the judgment and the order. Then, before the entry of any judgment of affirmance, the defendants' attorney served a notice of appeal to this court from the judgment entered at the trial term, and also from the order of the General Term affirming the judgment and the order denying the defendants' motion for a new trial.

" The case of *Kilmer v. Bradley* (80 N. Y. 630), is a precise authority for holding that the appeal to this court from the order affirming the judgment was unauthorized. Such an order is simply an authority for the entry of the judgment of affirmance. That judgment should first be entered and an appeal brought from that.

" But it is claimed that the defendants had a right to appeal to this court from the order of the General Term so far as it affirmed the order of the trial judge denying the motion for a new trial. We think otherwise. The appeal from that portion of the order could bring no question to this court which was not involved in the affirmance of the judgment. Upon such an appeal, if we could entertain it, we could review only questions of law raised upon the trial, and those questions would be involved upon an appeal from the judgment to be entered upon the order of affirmance. Under such circumstances an appeal from the order affirming the order which denied a new trial would be entirely nugatory. If that order

should be affirmed the defendants would still have the right, after entry of judgment of affirmance, to appeal from that and try the experiment upon that appeal of procuring a new trial by reversal of the judgment.

"If the appeal from the order affirming the order which denied the motion for a new trial should be successful, the judgment would still stand affirmed — unappealed from, and thus nothing would be gained by the defendants if successful upon the appeal, which they claim the right to make without the further interference of the court. To uphold such an appeal is trifling with the forms of law. Orderly practice requires that a judgment of affirmance should be entered and that the appeal should be taken from that. Hence this is not such an appeal from an order which grants or refuses a new trial as is contemplated by section 190 of the Code, and the motion should be denied with \$10 costs."

James R. Marvin for motion.

Nelson Smith opposed.

Per Curiam mem. for denial of motion.

All concur.

Motion denied.

EDWARD J. KELSEY, Respondent, v. JAMES SARGENT,
Appellant.

104	668
162	267

Where, upon trial of an issue of fact by the court or referee, an interlocutory judgment is rendered from which an appeal is taken, and also a motion for a new trial is made at the General Term as authorized by the Code of Civil Procedure (§ 1001), and an order is entered by that court affirming the judgment and denying the motion, so much of the order as denies the new trial is reviewable on appeal to this court. (Code of Civ. Pro. § 190, subd. 2.)

(Argued January 18, 1887; decided January 25, 1887.)

THIS was a motion to dismiss an appeal.

The following is the *mem.* of opinion therein :

"The judgment rendered at Special Term made a reference necessary; therefore, it was not final but interlocutory. (*Barker v. White*, 58 N. Y. 204.) An appeal, however, was taken to the General Term, and upon exceptions the defendant also moved that court for a new trial, under section 1001 of the Code. The judgment was affirmed and the motion for a new trial denied. One order embraced both decisions, and from the whole of that order the defendant appealed. So far as the appeal affects the order denying a new trial it was well taken (Code, § 190, subd. 2; *Raynor v. Raynor*, 94 N. Y. 248-251), and as the motion to dismiss relates to the whole appeal, and not a part only, it should be denied, and as the plaintiff asks for too much he should pay costs.

"Motion denied with \$10 costs."

Theodore Bacon for motion.

J. & Q. Van Voorhis opposed.

Per Curiam mem. for denial of motion.

All concur.

Motion denied.

ADELE STATES, Appellant, v. CHARLES J. CROMWELL,
Respondent.

This court has no jurisdiction to compel an appellant to attach to the return copies of documents which were not part of the record in the court below.

If the documents should for any reason be made part of the record a motion for that purpose should be made in the court below.

(Argued January 18, 1887; decided January 25, 1887.)

The following is the *mem.* handed down in this case :

"This is a motion to compel the appellant to correct the return to this court by adding thereto copies of certain documents and to serve copies of the return, as so amended, upon the respondent.

"A complete answer to the motion is that the documents are no part of the record in the court below, and that the record certified to this court is a correct copy of that record. If the documents should be a part of that record, for any reason, we have no jurisdiction to make them a part thereof; but a motion for that purpose should be made to the court below.

"Motion denied with \$10 costs."

George Zabriskie for motion.

Samuel L. Gross opposed.

Per Curiam mem. for denial of motion.

All concur.

Motion denied.

EMILY WAGNER, Respondent, v. THE METROPOLITAN ELEVATED
RAILWAY COMPANY, Appellant.

THIS case presented the same question and was argued and decided with *Lahr v. M. E. R. Co.* (*ante*, p. 268).

SUSAN RAYNOR et al., as Administrators, etc., Appellants, v.
SAMUEL S. CARMAN et. al., Respondents.

(Argued December 9, 1886; decided February 1, 1887.)

J. T. Marean for appellants.

H. E. Sickels for respondents.

Agree to affirm; no opinion.

All concur.

Order affirmed and judgment absolute on stipulation directed.

MICHAEL COFFKE, as Administrator, etc., Respondent, v. THE
BUFFALO, NEW YORK AND PHILADELPHIA RAILWAY COM-
PANY, Appellant.

(Argued January 17, 1887; decided February 1, 1887.)

John G. Milburn for Appellant.

James Fraser Gluck for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

In the Matter of the Estate of NATHANIEL GILMAN, deceased.

(Argued January 18, 1887; decided February 1, 1887.)

Raphael J. Moses, Jr., for appellant.

Henry E. Knox for respondent.

Agree to dismiss appeal ; no opinion.

All concur.

Appeal dismissed.

NICHOLAS RUCH, as Administrator, etc., Respondent, v. THE
NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY,
Appellant.

(Argued January 19, 1887; decided February 1, 1887.)

Norris Morey for appellant.

James Fraser Gluck for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

MARGARET KEARNEY as Administratrix, etc., Respondent, v.
GEORGE H. THOMPSON et al., Appellants.

(Argued January 19, 1887; decided February 1, 1887.)

John Van Voorhis for appellants.

J. A. Stull for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

PATRICK LEARY, an infant, by Guardian, Appellant, v. THE
PRESIDENT, MANAGERS AND COMPANY OF THE DELAWARE
AND HUDSON CANAL COMPANY, Respondent.

(Argued January 19, 1887; decided February 1, 1887.)

E. Countryman for appellant.

Edwin Young for respondent.

Agree to affirm; no opinion.

All concur, except PECKHAM, J., taking no part.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v.
HENRY K. STEVENS, Respondent.

104c	667
164	58

(Submitted January 20, 1887; decided February 1, 1887.)

THIS was an appeal from an order of General Term, entered upon a verdict reversing a judgment convicting the defendant of the crime of grand larceny.

The following is the *mem.* of opinion:

"The order of reversal states merely that it was made on questions of law. It does not state that the court has considered

the questions of fact or exercised the discretion which the statute confers upon it. We have decided that this court will not review an order of reversal in such a case, unless it shows that the court has exercised its discretionary powers. (See *People v. Boas*, 92 N. Y. 560-564; *Same v. Conroy*, 97 id. 62, 72; *Harris v. Burdett*, 73 id. 136.) Although the court in the present case puts its decision upon a question of law, we cannot say it would not have reached the same result had it exercised its discretion and entertained a different opinion on the question of law. The prisoner was entitled to a review of the facts and the exercise of the discretionary power of the court, which he might lose if the case should be disposed of solely on a question of law.

"The case should, therefore, be remitted to the General Term to consider the questions of fact and exercise its discretion."

George T. Quinby for appellant

John Laughlin for respondent.

Per Curiam mem. as given above.

All concur.

Ordered accordingly.

In the Matter of the General Assignment of L. CHRISTIAN
MEYER.

(Argued January 21, 1887; decided February 18, 1887.)

L. Ruser for appellant.

Z. W. Larned for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

PETER A. TILYOU, Appellant, v. THE TOWN OF GRAVESEND
et al., Respondents.

This case presented the same question and was argued and decided with *Tilyou v. Town of Gravesend*, ante, p. 356.

BESSIE J. CUMMING, by Guardian, etc., Respondent, v. THE
BROOKLYN CITY RAILROAD COMPANY, Appellant.

Where in an action to recover damages for injuries sustained by a child of tender years, who, when passing along a public street where it was crossed by a railroad track, was struck by a train, it appeared that the child exercised the degree of care and prudence required of a person *sui juris*, held, it was immaterial that the parents of the child were guilty of negligence in permitting it to be on the streets; and so that, the reception of improper evidence offered to excuse such negligence was not a ground for reversal.

It seems evidence that the parents were unable to hire any servant or person to aid the mother in looking after the child, is not competent to rebut proof of negligence on her part.

In such an action, held, that a municipal ordinance, prohibiting railroad companies from stopping their cars at a street intersection, so that they will interfere with travel on the cross streets, was properly received in evidence on the question of defendant's negligence, in connection with evidence that a train had stopped in violation of this ordinance, which prevented the plaintiff from seeing the approaching train.

(Argued January 20, 1887; decided February 8, 1887.)

THIS action was brought to recover damages for personal injuries sustained by plaintiff, alleged to have been caused by defendant's negligence.

The following is the opinion in full:

"The defendant operates a railroad, from the city of Brooklyn to Fort Hamilton, and runs its cars by means of a dummy engine. Its tracks are laid through Third avenue, which runs about north and south, where it crosses Thirty-ninth street at right angles.

"There was enough proved to make it proper to submit to the jury the question of the negligence of the defendant.

The injury occurred on the 10th of September, 1883, in the afternoon. Evidence was given that one train of two cars drawn by a dummy had come up on the east track, on its way to Brooklyn, and had stopped at Thirty-ninth street for a moment or two, the dummy reaching somewhat beyond the north crossing of the street, while the rear end of the rear car was still some seventeen or eighteen feet south of the south crosswalk; thus totally obstructing the passage on both crosswalks at Thirty-ninth street. The plaintiff was standing on the curb-stone, near the south-east corner of the avenue and the street, waiting for the train to proceed on its way to Brooklyn, and just about the time the train started she left the sidewalk and commenced to cross the street towards the west, and arrived at where the up train was passing at about the time the rear end of the second car was passing over the crossing, so that she left the north flag-stone of the crosswalk, and stepped to the south one and passed to the rear of the car and went towards the west or down track, and just as she stepped towards it she was struck by the dummy drawing a train coming from Brooklyn, and which she could not see until she stepped from behind the train going to Brooklyn. There was an ordinance of the city put in evidence, which provided that 'cars stopping at a street intersection shall stop at the further walk thereof so that the cars shall not, when stopped, interfere with the travel on the cross streets.'

"The train from the north came down making no noise by either bell or whistle, and was going very slowly in order to stop at the Thirty-ninth street crossing. The crossing at this place was very much used, there being, perhaps, no other street along the route as much occupied as that. To stop its cars so as to wholly obstruct the street, the effect of which was to prevent persons in the situation of the plaintiff from seeing any train coming from Brooklyn until the same was actually upon them, was certainly a fact proper to be submitted to a jury upon the question of whether the defendant was guilty of negligence in the running or management of its trains.

"The defendant claimed that the mother of the plaintiff was guilty of negligence in permitting the child to be at large,

and that as the child was but five years of age and *non sui juris*, this negligence of the mother was imputable to the child, and she could not therefore recover. To rebut this claim of negligence, the plaintiff proved that the mother was unable to hire any servant or person to aid her in looking after the child, and hence it was claimed, that as negligence is to be proved or disproved, from all the surrounding circumstances, this evidence of inability was proper.

"We are not prepared to sustain the correctness of the ruling which admitted this evidence, but it was addressed to the point of showing that the mother was not, under the circumstances, guilty of negligence, and such fact is entirely immaterial if the child herself was guilty of none. (*Ihl v. 42d st. & C. R. R.*, 47 N. Y. 317.) No facts were proved which showed any negligence on the part of the plaintiff. She was on a public street, and about to cross it, and waited for one train to pass the crosswalk on which she was. The street was a crowded one, and she naturally desired to get across it as soon as she reasonably could, and thus get out of danger from the carts, wagons and other vehicles in such street. As the car reaches her crosswalk she steps from one stone to the other and passes to the rear for the purpose of crossing and is struck by the other dummy before she has even got upon the track. In all this she acted as any one might who was taking ordinary care, and who was desirous of getting across a crowded street over a somewhat dangerous crossing, as soon as conveniently it could be done.

"The greatest difficulty in the plaintiff's case lies in the charge of the learned judge. He said to the jury that if they found defendant 'omitted precautions which they should have adopted in order to prevent injury to people on this highway, then they are responsible.' Again he said that 'it is for you to say, under the circumstances, whether or not the defendants should have adopted other precautions at this place than those which they did observe.'

"If the court by this charge submitted the question to the jury to say in a general way what precautions should have been adopted by defendant to prevent injury to the people on the street, it undoubtedly was error. Under such a charge

the jury might find a flagman was a proper precaution, or gates, or that a man should run in front of the cars, or anything else which should commend itself to the judgment of the jury. Such has been held not to be the measure of liability of a corporation in the situation of defendant. (*Beisiegel v. N. Y. C. R. R. Co.*, 40 N. Y. 9; *Dyer v. E. R. Co.*, 71 id. 228; *Houghkirk v. D. & H. C. Co.*, 92 id. 219.)

"We think, however, that such is not the fair import of the charge, taken as a whole. The judge commenced his charge upon this subject by saying that the defendant had a right to operate its railroad over the street in question. The context shows he meant by this nothing more than that the defendant had a right to run its cars over the street; for, he continues by saying, that while a pedestrian or person in a vehicle can avoid the railroad the engines and cars, on the contrary, are confined to the track; they must run upon that and they cannot turn to the right or to the left. Still, on the same subject, the judge continues and states that the railroad company, while bound to operate its road so as not to injure anybody, yet it was only bound to exercise ordinary care, and if careful, and still an accident happened, the defendant would not be liable. Then he adds the part objected to, that if on the contrary you find they omitted precautions which they should have adopted, in order to prevent injury to people upon this highway, then they are responsible.

"The duty of the company, as laid down by the judge in this sentence, seems clearly to be confined to the 'operation of its railroad,' and we have seen that in using such expression the judge meant only to say that in running its cars, or in their management, the defendant need only use ordinary care, but that if in thus running or managing its cars it omitted precautions, which, in the use of ordinary care it should have adopted in order to prevent this injury, then it was liable.

"The other portion of the charge relates to the failure to sound the whistle or ring the bell. The charge was explicit that there was no statutory duty to do either, but it left it to the jury to say whether, under all the circumstances, they should have adopted some other precautions than those they observed regarding the running of the train. We put the

last condition in for the reason already given that the judge used the expression 'operate their railroad' as meaning under the circumstances, run their cars; and with reference to this portion of the charge it is still more apparent that we are right in such interpretation, for, after using that expression, the judge continues with language as to the propriety, or the reverse, of sounding a whistle or ringing a bell in such a thoroughfare, which only applies to the manner of running the cars, and not in the least to the necessity for a flagman, or gates or anything of that nature. And it is thus perfectly apparent that the question submitted in reality to the jury was as to the lack of any precautions which ordinary prudence would dictate regarding the running of the cars or trains of the defendant.

"If this interpretation of the meaning of the charge be the true one, the exception fails. If there be a doubt as to the meaning thereof in that particular, we think that considering the language used, the whole spirit of the charge and the context, that the defendant should have not alone excepted generally, but should have gone far enough to call the attention of the court to the real error complained of, viz., that possibly the language might be construed too broadly and as meaning that the precautions to be observed related to the whole general manner of conducting the business of the railroad, and might be thought to include the absence of a flagman or of gates at the crossing, even though in the actual running of the train there was no negligence.

"In this case we do not mean to go one step beyond the well settled principles which have been adopted and frequently announced by this court. We simply say that the fair import of the charge, taken as a whole, is in accordance with such principles.

"The defendant excepted to the refusal of the judge to charge that the ordinance put in evidence related to railroads operated with horse-power and not to those operated with steam power.

"We think there was no error in such refusal. The other sections of such ordinance showed remedies applicable to rail-

roads operated by horse-power, but they do not control the express language of the section in question, which is broad enough to cover the case of a railroad operated by steam. In addition to that, the place for stopping cars, as provided in the ordinance, would commend itself to the good sense and judgment of every one; and even if there were no such ordinance, the failure of the defendant to operate its train in accordance with such a principle might fairly be submitted to a jury upon the question of its negligence in the management and operation of its trains.

"The judgment should be affirmed."

Nathaniel C. Moak for appellant.

B. F. Tracy for respondent.

PECKHAM, J., reads for affirmance.

All concur.

Judgment affirmed.

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156 218
104a674
162 280

HIRAM SMITH et al., Respondents, *v.* THE CITY OF ROCHESTER,
Appellant.

(Argued January 25, 1887; decided February 8, 1887.)

Ivan Powers for appellant.

Theodore Bacon for respondents.

Agree to affirm; no opinion.

All occur.

Judgment affirmed.

JOHN N. GRAVILLE, Respondent, *v.* THE NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Where the plaintiff succeeds on trial in an action not founded on contract, the amount of the judgment as rendered, exclusive of costs is to be

considered "the amount in controversy" in determining as to whether the judgment is reviewable here.

The fact that the complaint asks judgment for less than \$500, or that in fixing damages, interest is included as an item thereof, is not material.

(Argued February 1, 1887; decided February 8, 1887.)

THIS was a motion to dismiss the appeal herein.

The following is the *mem.* of opinion:

"The plaintiff sued for injuries to personal property caused by the defendant's negligence, and after issue joined, was, upon trial before a referee, awarded \$400, with \$156 interest, making a total of \$556, and for this sum judgment was ordered in his favor. The record shows that judgment was so entered: 'Damages \$556, and \$357.44 costs and disbursements.' Upon appeal to the General Term it was affirmed, and from the judgment of affirmance the defendant appealed to this court. The plaintiff moves to dismiss the appeal upon the ground as stated in the notice of motion, 'that the amount in controversy in this action is less than \$500.' This contention is put upon the complaint, which alleges damages only to the amount of \$400, and demands judgment accordingly. But neither this limitation, nor the method by which the referee ascertained and then made up the aggregate of damages is material. The matter in controversy in this court, upon the defendant's appeal, is the amount of the judgment as rendered, and from which the appeal is taken (*Brown v. Sigourney*, 72 N. Y. 122), and if that, excluding costs, is not less than \$500, we have jurisdiction to review it. A different rule restricts the plaintiff. Upon an appeal by him from a judgment in such an action, the sum for which the complaint demands judgment becomes material. (Code, § 191, subd. 3.) But the provision of the Code which makes it so has no application here.

"The motion should be denied, with \$10 costs."

M. B. Barnett for motion.

C. D. Prescott, opposed

DANFORTH, J., reads *mem.* for denial of motion to dismiss appeal.

All concur.

Motion denied.

ADAM EMMERICH *v.* PETER HEFFERAN.

(Argued February 1, 1887; decided February 8, 1887.)

Wales F. Severance for motion.

Wm. G. McCrea opposed.

Motion to dismiss appeal from order refusing to grant a new trial granted.

Motion to dismiss appeal from judgment granted, unless the sureties on the bond of the appellant shall justify, if required by respondent, in which case motion denied.

All concur; no opinion.

Ordered accordingly.

J. DANIEL ACKERMAN et al., Appellants, *v.* ISAAC P. POWERS,
Respondent.

(Argued January 26, 1887; decided February 11, 1887.)

W. H. Hubbard for appellants.

Hannibal Smith for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

ELVIRA VICK, as Administratrix, etc., Appellant, *v.* THE NEW
YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Respondent.

(Argued January 31, 1887; decided February 11, 1887.)

William S. Oliver for appellant.

Edward Harris for Respondent

Agree to affirm ; no opinion.

All concur except RUGER, Ch. J., and DANFORTH, J., not voting.

Judgment affirmed.

In the Matter of the Application of the WATER COMMISSIONERS
OF AMSTERDAM, to acquire title to lands of JOHN CHALMERS
et al.

The words "with costs" in an order of affirmance or reversal in this court, in a case where the allowance of costs is discretionary, mean costs in this court only.

(*Murtha v. Curley*, 92 N. Y. 359), distinguished.

(Argued February 1, 1887; decided February 11, 1887.)

THIS was an appeal from an order of General Term, affirming an order of Special Term directing a retaxation of costs.

This court reversed an order of General Term herein, confirming a report and award of commissioners, set aside the report "with costs," and directed a rehearing before new commissioners. The clerk taxed only costs of the Court of Appeals.

The following is the *mem.* of opinion.

"In the case of *The Sisters of Charity v. Kelly* (88 N. Y. 628), we construed the words 'with costs' in an order of reversal or affirmance in this court, in a case where the allowance of costs is discretionary as meaning costs in this court only. The case of *Murtha v. Curley* (92 N. Y. 359) was one where the prevailing party was entitled to costs as of course, and the decision was placed upon that ground.

"The rule we established in *The Sisters of Charity v. Kelly* has been followed since the decision of that case, unless by inadvertence.

104	677
126	660
104	677
148	738

"The reversal on the original appeal in this case was 'with costs,' and as construed, entitled the appellant to costs in this court only. If the appellant deemed himself aggrieved, his remedy was to apply to this court for an amendment of the order. The order of the General and Special Terms should, therefore, be reversed, and the taxation by the clerk affirmed.

"But as the appellant may have been misled by a remark in the opinion in *Murtha v. Curley*, as published in 3 Civil Procedure Report, 265, but intentionally omitted in the opinion as published in the regular series, we think the reversal should be without costs."

M. L. Stover for appellant.

John M. Carroll for respondent.

Per Curiam opinion for reversal of orders of General and Special Terms and the taxation of the clerk affirmed.

All concur.

Ordered accordingly.

THE PEOPLE ex rel. SIDNEY DILLON et al., Appellants, v.
EDWARD GILON et al., composing the Board of Assessors,
etc., Respondents.

(Argued February 1, 1887; decided February 11, 1887.)

Truman H. Baldwin for appellants.

D. J. Dean for respondents.

Agree to affirm; no opinion.

All concur.

Order affirmed.

SARAH M. SIMMONS, Appellant, v. ZACHARIAH E. SIMMONS,
Respondent.

(Argued February 1, 1887; decided February 11, 1887.)

Charles H. Woodbury for appellant.

W. C. Beecher for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

THE PEOPLE ex rel. THE PRESIDENT, MANAGERS AND COM-
PANY OF THE DELAWARE AND HUDSON CANAL COMPANY,
Respondent, v. ZACHARIAH ROOSA et al., Assessors, etc.,
Appellants.

(Argued February 1, 1887; decided February 11, 1887.)

J. Newton Fiero and *A. J. Clearwater* for appellants.

P. Cantine for respondent.

Agree to dismiss appeal; no opinion.

All concur, except PECKHAM, J., taking no part.

Appeal dismissed.

In the Matter of the Application of the STATEN ISLAND
RAPID TRANSIT RAILROAD COMPANY to Acquire Title to
Lands of the NEW YORK DYEING AND PRINTING ESTABLISH-
MENT et al.

(Argued February 1, 1887; decided February 11, 1887.)

William M. Mullen for appellant.

Albert B. Boardman for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

In the Matter of the Application of the STATEN ISLAND
RAPID TRANSIT RAILROAD COMPANY to Acquire Title to
Lands of CHARLES K. HAMILTON et al.

(Argued February 1, 1887; decided February 11, 1887.)

N. Pendleton Schenck for appellant.

Albert B. Boardman for respondent.

All concur.

Agree to dismiss appeal ; no opinion.

Appeal dismissed.

THE MANCHESTER PAPER COMPANY, Appellant, v. JACOB R.
MOORE, as Administrator, etc., Respondent.

Where a vendor of goods renders accounts to the purchaser periodically and the latter, after examination, retains them without objection, they constitute accounts stated and can only be opened and investigated upon proof of fraud or mistake.

Where goods were delivered under a contract by which the purchaser agreed to pay the "ruling market rates," and it appeared there were two market rates, one for goods of the kind bought of importers and another for them as sold by jobbers, *held*, it was competent to give in evidence the conversation of the parties and the surrounding circumstances for the purpose of showing which of the two was intended by the parties.

(Argued January 27, 1887; decided March 1, 1887.)

THE following is the *mem.* of opinion in this action :

"The accounts rendered monthly during four years by Jessup and Moore to the plaintiff, and after examination retained without objection constituted accounts stated and could only be opened and investigated upon proof of fraud or mistake. The plaintiff evidently recognized this feature of the situation, for the complaint expressly charges fraud or mistake in the rendition of the accounts, and the denial of the defendant put that issue into the case. The items

assailed as thus fraudulent or mistaken, were the chemicals furnished at the prices charged, and the computations of interest. The contract between the parties was embodied in a letter written by the defendants, referring to previous conversations, and purporting to frame their meaning into the terms of a written agreement. Among those terms it was specified that the supplies for the plaintiff's paper mill were to be furnished by the defendants at the "ruling market rates." The evidence discloses that the market rates for chemicals bought of importers were a fraction below the market rates for the same goods as sold by jobbers among the other supplies necessary to the manufacture of paper. The fact thus disclosed raised a latent ambiguity in the language of the written contract, and opened the inquiry which of the two market rates was meant or intended by the terms of the contract. The previous conversations of the parties tending to show in what sense the subsequent words as written were understood and bearing upon the issue of fraud between the parties, only to be investigated by a complete survey of all that occurred relating to the transaction, were admissible in evidence. When these conversations were first offered, the defendant objected upon the ground that the terms of the writing could not be varied or contradicted by parol proof. The court expressly declined to receive the evidence for any such purpose. The defendant conceded, by the form of his objection, in which he insisted that the question asked 'should be confined to the explanation of some phrase in the written contracts' that so much of the conversation as tended to such an explanation was admissible. The evidence thereafter given did not transgress this limitation. It exposed the situation of the parties, the surrounding circumstances, the characteristics of the business conducted by each, their relative needs and modes of action, thus enabling the court to read the instrument from the standpoint of the parties themselves. That conversation developed that by ruling market rates the parties meant and intended the jobbers rates as established by those who, like the defendants, were engaged in furnishing paper-maker's supplies generally and of all kinds, and not the

importer's rates for chemicals alone, and showed further that the defendants, in charging jobber's rates were guilty of no fraud, but conforming to an understood and expressed intention. We think, therefore, that no error was committed in admitting the evidence objected to, nor in holding that the rates charged were in conformity to the terms of the contract and not fraudulent or mistaken. In *Dent v. N. A. Steamship Co.* (49 N. Y. 390), the offer rejected was to show the prior parol agreement of the parties. The effort was to substitute the verbal language for the written language of the contract which, of course, was inadmissible. Facts existing, it was said, might be shown in aid of interpreting the written words, but not different language as constituting the agreement. In the present case the accounts stated conclusively interpreted the instrument unless they were fraudulent or mistaken, and upon that issue all that was said and done leading up to the written contracts and tending to establish the absence of fraud in the charges made was certainly admissible.

"The same thing is true as to the manner of computing interest. It is proved that the defendants showed and carefully explained to the superintendent of plaintiff their interest computations with their own mill and their mode of charging the same as an illustration of the manner in which they proposed to conduct the business, to which the superintendent assented. These computations appeared upon fifty-four different accounts running through the entire business relation of the parties, and the finding of the referee that such accounts were neither fraudulent nor mistaken, leaves them binding upon the parties.

"The judgment should be affirmed, with costs."

Henry G. Burnett for appellant.

M. W. Divine for respondent.

FINCH, J., reads *mem.* for affirmance.

All concur.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
ALEXANDER H. REAVY, Appellant.

104a	683
164	145

(Argued February 2, 1887; decided March 1, 1887.)

A. Suydam for appellant.

McKenzie Semple for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

WILLIAM H. VAN OSTRAN, an Infant, etc, Respondent, v.
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD
COMPANY, Appellant.

(Argued February 4, 1887; decided March 1, 1887.)

William H. Adams for appellant.

Harold E. Hills for respondent.

Agree to affirm; no opinion.

All concur, except RAPALLO and EARL JJ not voting.

Judgment affirmed.

JOHN MURRAY, an Infant, etc., Respondent, v. HENRY A.
SMITH, Appellant.

(Argued February 7, 1887; decided March 1, 1887.)

Edward C. Ripley for appellant.

Charles J. Patterson for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

684 MEMORANDA OF CAUSES NOT REPORTED.

ALFRED TALLMAN, Respondent, *v.* THE TOWN OF RAMAPO,
Appellant.

(Argued February 7, 1887; decided March 1, 1887.)

Garrett Z. Snider for appellant.

Cornelius P. Hoffman for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

WILLIAM H. DORAN, an Infant, etc. Appellant, *v.* THE CITY
OF TROY, Respondent.

(Argued February 8, 1887; decided March 1, 1887.)

R. A. Parmenter for appellant.

William J. Roche for respondent.

Agree to affirm ; no opinion.

All concur except PECKHAM, J., not voting.

Judgment affirmed.

INDEX.

ABATEMENT AND REVIVAL.

1. As the rights and liabilities under the penal provisions of the General Manufacturing Act (Chap. 40, Laws of 1848), are not only "regulated by special provision of law," but have no existence outside of the statute, the right of transfer given by the Code of Civil Procedure (§ 1910), does not under said Code give a right of enforcement to the transferee (§ 1909), but leaves the question of that right to the existing law. *Blake v. Griswold.* 618
2. The rule of the common law governs the question as to the survivability of a cause of action, to recover the penalty imposed by said act upon a trustee of a corporation organized under it, who has joined in making a false annual report; it is not affected by any provision of the Code, and the action abates upon the death of either party. *Id.*
3. Where, however, the plaintiff in such an action dies, after the rendition of judgment, the action does not abate, and the cause of action is merged in the judgment, which passes as assets to the representatives of the deceased, and they are entitled to be substituted in his place. (Code of Civ. Pro., §§ 1912, 1297, 1298). *Id.*
4. *It seems* that until such substitution an appeal from the judgment may not be heard. *Id.*
5. Where, however, an appeal to this court in such case was heard without knowledge of the death and the judgment was affirmed. *Held*, that on granting a motion for substitution the court could affirm the judgment in favor of the substituted representative. *Id.*

ACCOMPLICES.

1. Defendant's counsel asked the court to charge, in relation to facts necessary for the corroboration of an accomplice, "that they must be inconsistent with the innocence of the defendant, and which exclude every hypothesis but that of guilt." The court refused so to charge. *Held*, no error; that the rule only requires a corroboration as to some material fact which goes to prove the prisoner was connected with the crime. *People v. Oyle.* 511
2. The court, after it had left the question of the credibility of witnesses, claimed to be accomplices, to the jury, refused to charge that the jury would be justified in requiring every fact sworn to by said witnesses to be corroborated to its satisfaction, and if not so corroborated, to reject the fact as not proved. *Held*, no error. *Id.*
3. The provision of the Code of Criminal Procedure (§ 399), requiring corroboration of the testimony of an accomplice is complied with, if there is some other evidence fairly tending to connect the defendant with the commission of the crime charged, so that the conviction will not rest entirely upon the evidence of the accomplice. The question as to whether the evidence is sufficient corroboration is for the determination of a jury. *People v. Everhardt.* 591

ACCOUNT STATED.

Where a vendor of goods renders accounts to the purchaser periodically and the latter, after examination, retains them without objection, they constitute accounts

stated and can only be opened and investigated upon proof of fraud or mistake. *Manchester Paper Co. v. Moore.* 680

ACCOUNTING.

1. Although under a will it is possible for an executor to exchange the character for that of trustee, until he is discharged as executor by decree of the surrogate and directed to hold the remaining assets as trustee, or at least until there has been a payment to him as trustee, a new account opened and kept in the new capacity and a division of the fund, allotting to different beneficiaries their specific proportions, he remains as executor only, and is removable as such for misconduct. After such removal, upon petition of his successor, the Surrogate's Court has jurisdiction to compel him to account for and deliver over to his successor the assets in his hands. (Code of Civ. Pro. §§ 2724, 2805.) *In re Hood.* 103
2. T. applied to G. and two others for a loan to a corporation. This they refused, but an agreement was made, under which they loaned the money to T., taking his notes therefor. T. loaned the money to the corporation, taking its notes therefor, corresponding in the times of payments and amounts with those given by T. which were secured by mortgage on real estate of the corporation; these were assigned by T. as security for the loan. G. died and T. was appointed one of his administrators. He subsequently received another mortgage from the corporation on other lands, which he also assigned as collateral for the loan. This last mortgage was foreclosed by advertisement by the two surviving assignees and the administrators of G. The premises were bid off by the administrators, who, however, paid no money on the purchase. The interest of G. in the notes given by T. was set forth as assets in the inventory of his estate, and on final settlement of the accounts of the administrators, it appeared that such interest had been paid in full by T. and the accounts were so settled. Subsequently, the administrators joined in a deed of the said premises to a son of T., who conveyed the same to his father. In proceedings to compel T. to account, as administrator, for the proceeds received by him on sale of said lands, *held*, that on payment of the debt to the estate, T. was entitled to the land; that the fact that, as administrator, he was party to the foreclosure did not affect his equities; and that, therefore, he could not be compelled to account for such proceeds. *In re Gilbert.* 200
3. It was claimed that by the agreement of the parties the estate was entitled to a greater rate of interest than was called for by the notes, or was accounted for by the administrator. *Held*, that such a claim could not survive the settlement of his accounts, as it should then have been asserted. *Id.*
4. The will of M. gave to his executors certain portions of his estate in trust "to receive the rents, interest and income," and to apply the net amounts thereof to the use of the testator's widow during her life, remainder to beneficiaries named. The testator died during the night of April 20, 1881. The trust fund included certain shares of stock of the P. R. R. Co. On April 14, 1881, a dividend of \$25,000 was declared on this stock, "payable May 2, 1881." On final accounting the executors charged themselves with this sum, treating the dividend as principal. *Held*, no error; that as soon as the dividend was declared the owner of the shares was entitled to it, and it became part of his estate; that the fact that it was made payable at a future time was immaterial; that the dividends to which the life tenant was entitled as income were only those declared after the testator's death. *In re Kernochan.* 618
5. On the same principle, *held*, that the widow was entitled to the whole of an extra dividend, declared after such death, although

made from net earnings accumulated before that time; that, whenever earned, they were not profits until so declared. *Id.*

6. Prior to the death of the testator the P. R. R. Co. had accumulated a fund from earnings which was set aside as a sinking fund to pay outstanding obligations, certain of the stockholders, including the executors, entered into an agreement with another company for a sale of their stock to the company at \$250 per share, the company to have the sinking fund, and to pay said shareholders a ratable portion thereof, which was equivalent to \$15.74 per share. In the account this was included as part of the price received and credited as principal. *Held*, no error; as it was received, not as a dividend, but as part of the price for which the stock was sold, and so belonged to the remaindermen. *Id.*

7. The executors classed as income the value of certain options or privileges given to stockholders by various companies to subscribe for and take at par certain stocks and bonds. *Held*, error; that as the right accrued only on condition the estate chose to purchase or pay for the bonds or stocks, if the options were accepted the purchases operated to increase the capital or change its manner of investment, and so the value of the options did not belong to the life tenant.. *Id.*

8. The testator had in his hands for investment and reinvestment certain moneys belonging to his wife, which he mingled with his own funds. *Held* (EARL, J., dissenting), that the estate was properly charged with compound interest thereon. *Id.*

9. By the will Mrs. M. was appointed executrix; she duly qualified and acted as such. The will contained a direction that each executor and trustee, other than his wife, "do receive and take the full rate of commissions provided by law for each executor;" substantially the whole income of the estate was

given to her. *Held*, that she was not entitled to commissions as it was the intention of the testator to exclude her from compensation. *Id.*

ACTS OF CONGRESS.

1. In an action against the owner of the steam yacht "Yosemite," to recover damages for alleged negligence in colliding with and sinking plaintiff's steamboat, it appeared that the "Yosemite" was described in her license as a yacht "used and employed exclusively as a pleasure vessel and designed as a model of naval architecture." By the United States statutes (§ 2, chap. 141, U. S. Laws of 1848) the secretary of the treasury was authorized to cause such yachts, if entitled to be enrolled as American vessels, to be licensed "to proceed from port to port of the United States without entering or clearing at the custom house, or exclusively as coasting vessels. By an amendment of said statute (§ 2, chap. 140, U. S. Laws of 1870; U. S. R. S., § 4214) the words "and by sea to foreign ports" were added. The "Yosemite" was, at the time of the injury complained of, enrolled at the port of New York. Her certificate of enrollment recited that it was given in conformity to the title of the United States Revised Statutes, which relates exclusively to coasting and fishing vessels. Her license was a coasting license, with the added privilege of going by sea to foreign ports. The "Yosemite," at the time of the injury complained of, was proceeding up the Hudson river under steam. She carried the lights prescribed for ocean-going steamers and steamers carrying sail (U. S. R. S. § 4233, rule 8), but did not carry the "central range of two white lights" prescribed for coasting vessels navigating inland waters (Rule 7). *Held*, that the "Yosemite" was, at the time of the accident, navigating under her license in the character of a coasting vessel; that she was in fault in not carrying the lights prescribed for such vessels, and that

the trial court erred in nonsuiting plaintiff. *Chase v. Belden.* 86

2. *It seems*, if the collision had happened upon the high seas, another question would have been presented. *Id.*

ADVANCEMENT.

1. A gift by a father to a child entitled to share in the estate of the donor, will not be held to be an advancement within the meaning of the provision of the statute of descents (1 R. S., 754, § 23), in relation to advancements to a child of an intestate, where it expressly appears to have been the intention of the father that the gift should not be considered as an advancement. *In re Morgan.* 74
2. A gift made by the intestate to his wife is not affected by said provision; such a set-off is only allowed as against children. *Id.*

ALIENATION (SUSPENSION OF POWER OF).

See SUSPENSION OF POWER OF ALIENATION.

ALMS-HOUSE.

The object of plaintiff's incorporation, as expressed in its constitution, made pursuant to its charter (Chap. 282, Laws of 1838), is "to provide and maintain a place of refuge for colored orphans where they shall be boarded and suitably educated." Plaintiff purchased certain real estate in the city of New York, which with the buildings thereon are used for the purpose of its incorporation. By the "House Rules" religious services are required to be held once a day each Sunday and on certain other days specified, but no visitors are allowed to be admitted on Sunday except under pressing circumstances, and with the consent of the superintendent. In an action to have certain taxes imposed upon

the land declared void; *held*, that the building upon the land in question was not a "school house," "an incorporated academy or other seminary of learning," or a "building for public worship," within the meaning of the provision of the Revised Statutes in reference to exemptions from taxation (1 R. S. 883, § 4, subd. 3), at least as limited by the provisions of the statute in relation to such exemption in the city of New York (Chap. 282, Laws of 1852; § 827, chap. 410, Laws of 1882), but that it was an "alms-house" within said provision of the Revised Statutes (§ 4, subd. 4, as amended by chap. 136, Laws of 1866), and as such it and the land were exempt from taxation. *Ass'n C. O. v. Mayor, etc.* 581

AMENDMENT.

1. The action was brought against defendants, as executors of P., and the complaint sought to charge them only in that capacity. After the trial an order was granted amending the summons and complaint and directing the judgment awarded to be entered against the defendants, individually and *de bonis propriis*. *Held*, that the order was properly reversed by the General Term; that the amendment substituted a new and different cause of action, which the defendants as individuals had had no opportunity to defend. *Van Cott v. Prentice.* 45
2. Where an indictment under the Penal Code (§ 284) for seduction under promise of marriage, is defective in not giving the correct surname of the female, the court, on trial, has power to cure the defect by directing an amendment. *People v. Johnson.* 213
3. The provisions of the Code of Criminal Procedure, allowing such an amendment (§§ 6, 7, 275, 281, 293, 294, 295), are not violative of the provision of the State Constitution (art. 1, § 8), declaring that "no person shall be held to answer for a capital or otherwise

infamous crime * * * unless upon presentment or indictment of a grand jury." *Id.*

APPEAL.

1. An exception to an erroneous ruling of a surrogate on the trial by him of an issue of fact is not a ground for reversal, where it does not appear that the exceptant was necessarily prejudiced thereby. (Code of Civ. Pro. § 2545.) *In re Morgan.* 74
2. The discretion of the court to grant or refuse a writ of *mandamus* is not absolute but is governed by legal rules, and its exercise is subject to review here. *People ex rel. Millard v. Chapin.* 96
3. The failure of a surrogate to make findings of fact and law as required by the Code of Civil Procedure (§ 2545), upon the trial of an issue of fact before him, is not a ground of objection to his decision on appeal. It is the duty of the party appealing to procure to be made such findings or refusals as will present, through appropriate exceptions, the question he desires to argue; if he omits to do this, no question is presented for review. *In re Hood.* 108
4. In an action to recover for services alleged to have been rendered to defendant's testator, after proof of the rendition of the services, plaintiff, as a witness in his own behalf, was asked if he had been paid therefor, this was objected to as involving a personal transaction with the deceased. The objection was overruled and plaintiff answered "No." Defendant offered no evidence tending to show payment. *Held*, that while the objection was good the evidence was wholly immaterial and could have done no harm, as payment was an affirmative defense, and the burden of proving it was upon the defendant. *Lerche v. Brasher.* 157
5. An order of a surrogate, adjudging against the denial of an administrator, that there are assets of the estate in his hands, and requiring him to account therefor, is an order affecting a substantial right, and so is appealable to the General Term. (Code of Civil Procedure, § 2570.) *In re Gilbert.* 200
6. It is not essential to such an appeal that the order be a "final" one, as is requisite to authorize a review thereof in this court. (§ 190.) *Id.*
7. An abstract opinion of the court in its charge on the trial of a criminal action, not based on any evidence in the case, even if technically erroneous, is no ground for reversal on appeal. (Code of Criminal Procedure, § 542.) *People v. Johnson.* 218
8. The necessity of an order of the Court of Common Pleas of the city of New York, allowing an appeal to this court as required by the Code of Civil Procedure (§ 190), was not dispensed with by the act of 1886 (chap. 418, Laws of 1886), in reference to appeals from judgments of the General Term of the City Court; as the main object of the act, which is to dispense with appeals from such judgments to the Court of Common Pleas, has failed because unconstitutional, and as all the provisions are connected, being part of a single scheme, the incidental provision must fail also. *Jones v. Jones.* 234
9. The conclusions of the assessors upon conflicting evidence as to value of property assessed are not reviewable here. *People ex rel. R. W. & O. R. R. Co. v. Haupt.* 377
10. Exceptions herein were ordered to be heard at first instance at General Term, and upon argument there an order was made denying motion for new trial, overruling the exceptions and directing judgment on the verdict. Defendant appealed from the order and from the judgment entered thereon. Plaintiffs claimed

- the order was not appealable, and that the appeal from the judgment brought up nothing for review but the question whether the judgment was in accordance with the order, as there was no statement in the notice of appeal that the appellant intended to bring up for review an intermediate order as required by the Code of Civil Procedure (§§ 1301, 1316). *Held*, that the order was not an intermediate order, within the meaning of the Code, and that while the appeal therefrom was useless, yet, as it was taken in connection with the appeal from the judgment, it was not necessary to dismiss it, as the latter brought up all the exceptions for review. *Becker v. Koch.* 394
11. It is within the discretion of the court to determine how far the examination as to the admissibility of statements of a deceased person offered as dying declarations shall extend. The exercise of that discretion is reviewable by the General Term, but not by this court; unless it appears that such discretion was abused, and the action of the court arbitrary and unreasonable. *People v. Smith.* 491
 12. *It seems*, that where a plaintiff dies pending an appeal to this court until his personal representatives are substituted the appeal may not be heard. *Blake v. Griswold.* 613
 13. Where, however, an appeal to this court in such case was heard without knowledge of the death and the judgment was affirmed. *Held*, that on granting a motion for substitution the court could affirm the judgment in favor of the substituted representative. *Id.*
 14. Where an order of General Term reversing a judgment and granting a new trial, is affirmed on appeal to this court, the stipulation given on appeal compels an award of judgment absolute against the appellant, although it appears he was entitled to part of the relief granted by the judgment. *Conklin v. Snider.* 641
 15. It is only where the error which might have justified a reversal of the judgment was merely incidental and capable of accurate correction, and so the judgment should have been corrected below without the award of a new trial, that this court may modify the judgment by correcting the error. *Id.*
 16. A party may not receive and accept the amount awarded to him by a judgment and appeal therefrom; and when, after an appeal has been brought, he thus accepts the benefit of the judgment, he thereby waives the appeal. *Alexander v. Alexander.* 643
 17. An appeal to this court from an affirmance by the General Term of a surrogate's decree, upon trial of an issue of fact, brings nothing here for review not presented by appeal to the General Term, and, upon appeal to the General Term, no finding or decision can be reviewed that was not excepted to. (Code of Civ. Pro. § 2545.) *In re Kellogg.* 648
 18. Where objection to a claim paid by an executor that it was barred by the statute of limitations at the time of payment was not taken upon settlement of the executor's accounts, it may not be raised on appeal. *Id.*
 19. Upon settlement of the accounts of an executor the surrogate improperly charged him with an item of \$11,000 and credited him with the amount of a claim against the estate which he had paid in full. The General Term, on appeal, struck out the erroneous charge, and as this left the estate insolvent, readjusted the account by disallowing the over payment. *Held*, that the General Term had the right to so modify the decree instead of sending it back for a rehearing before the surrogate. (Code of Civ. Pro. § 2587.) *Id.*
 20. An appeal may not be taken to this court from an order of General Term affirming a judgment; so, also, where there is both an appeal to the General Term from a judgment and from an

order denying a motion for a new trial, and the judgment and order are affirmed, an appeal is not authorized from so much of the order as affirms the order denying a new trial. Such an appeal brings no question before this court not involved in an appeal from a judgment entered on the General Term order. Judgment should first be entered on such order and an appeal taken from that. *Derleth v. De Graff.* 661

21. Where, upon trial of an issue of fact by the court or referee, an interlocutory judgment is rendered from which an appeal is taken, and also a motion for a new trial is made at the General Term as authorized by the Code of Civil Procedure (§ 1001), and an order is entered by that court affirming the judgment and denying the motion, so much of the order as denies the new trial is reviewable on appeal to this court. (Code of Civ. Pro. § 190, subd. 2.) *Kelsey v. Sargent.* 663

22. This court has no jurisdiction to compel an appellant to attach to the return copies of documents which were not part of the record in the court below. *States v. Cromwell.* 664

23. If the documents should for any reason be made part of the record a motion for that purpose should be made in the court below. *Id.*

24. Where the plaintiff succeeds on trial in an action not founded on contract, the amount of the judgment as rendered, exclusive of costs is to be considered "the amount in controversy" in determining as to whether the judgment is reviewable here. *Graville v. N. Y. C., etc., R. R. Co.* 674

25. The fact that the complaint asks judgment for less than \$500, or that in fixing damages, interest is included as an item thereof, is not material. *Id.*

— Jurisdiction of Court of Appeals confined to review of determination actually made by the court

below, and must be had upon the papers before the General Term.

See In re N. Y. C. Co. v. Mayor, etc. 1

— When evidence sufficient to give court jurisdiction to issue attachment, and so its exercise not reviewable here.

See N. P. Bank v. Whitmore. 297

— Where motion for relaxation of costs was granted, with directions to the clerk to tax in addition a trial fee and \$10 additional because trial occupied more than twenty days, and the papers on which motion was made were not included in return, but instead a mere memorandum containing an extract from judgment, and of the costs as taxed, with stipulation of the attorney that it was assessed to "as and for papers on appeal." Held that nothing appeared to make the appellant's objection intelligible.

See Creshull v. Mullin. 660

— Where order of reversal in criminal action stated it was made on questions of law, but did not state that the court had considered the questions of fact. Held, that the order was not reviewable as the defendant was entitled to a review of the facts, and the exercise of the discretionary power of the court as granting a new trial thereon. Case remitted to the General Term to consider those questions.

See People v. Stevens. (Mem.) 667

ASSESSMENT AND TAXATION.

1. The board of assessors of the city of New York, in performing the duties imposed upon it by the act of 1872 (Chap. 729, Laws of 1872), in relation to the improvement of Eighth avenue in that city, did not act as the servants or officers of the municipal corporation, but as an independent tribunal, deriving its whole authority from the statute. *Heiser v. Mayor, etc.* 68

2. An equitable action is not maintainable to vacate an award and assessment made by said board, by reason of alleged fraud on the part of the assessors in making it, as the

party aggrieved has a sufficient remedy at law. *Id.*

3. By the judgment in an action for the foreclosure of a mortgage upon premises in the city of New York owned by G., plaintiff's intestate, the referee appointed to sell was directed to pay all assessments on the mortgaged premises out of the proceeds of sale. At the time of the sale there was an assessment on the premises for a local improvement, which the referee paid. This assessment was, on the application of G., subsequently vacated. In an action brought to recover back the amount paid, *held* that although the assessment was paid without the knowledge of G., yet as it was paid by order of the court, out of moneys belonging to him, and the court had power to direct the payment so long as the assessment was not vacated, and as its validity could not be determined in the foreclosure suit, the payment was equivalent to a collection from G. under process of law, and he was entitled to recover; also that it was not necessary, as a condition of recovery, to have the foreclosure judgment set aside or annulled; it was not the adjudication which created the apparent lien, or the authority upon which the right of the city, as between it and the property owner, to collect the assessment, depended. *Brehm v. Mayor, etc.* 186

4. The order vacating the assessment was granted December 4, 1871. Plaintiff presented his claim to the comptroller November 17, 1877, pursuant to the requirements of the city charter (§ 105, chap. 885, Laws of 1873) and this action was commenced December 18, 1877. The statute of limitations was pleaded as a defense, but the complaint was dismissed upon the trial wholly upon other grounds. *Held*, that the statute could not be invoked to sustain the dismissal, as, if error was committed in the ruling, it could not be cured by raising a question on appeal not raised on the trial; also, *held*, that the claim was not barred by the statute; that, as by the Code of Civil Procedure (§ 406), "when the com-

mencement of an action has been stayed * * * by statutory prohibition, the time of the continuance of the stay is not a part of the time limited for the commencement of the action," and as by the city charter (§ 105) plaintiff was prohibited from bringing suit until after the lapse of thirty days from the presentation of the claim, the running of the statute was suspended during the thirty days. *Id.*

5. Under the act of 1857 (Chap. 456, Laws of 1857), in reference to the assessment of taxes on corporations, the capital stock of a corporation, less the part thereof owned by the State or by literary or charitable institutions, or exempted from taxation by the Revised Statutes (1 R. S. 388, § 4), is to be assessed at its actual value, whether more or less than its nominal amount, deducting, however, therefrom the assessed value of its real estate and shares owned by it in other taxable corporations, and, also, from its surplus or reserved fund, if any, an amount not exceeding ten per cent. of its capital. *People ex rel. P. R. R. Co. v. Com'rs Taxes.* 240
6. Where a corporation, liable to taxation under said act, has real estate in another State or country, the provision directing a deduction of the assessed value of such real estate requires that the deduction shall be measured by its actual value, and, in the absence of other and better evidence, the price paid for the real estate may be taken as representing such value. *Id.*
7. It is incumbent upon a corporation, before it is entitled to call upon the court, to correct an assessment by increasing the sum to be deducted for the value of its real estate, to give evidence and furnish data, showing that the actual value exceeds the sum fixed by the assessors. It is not enough that the evidence raises a doubt or permits a conjecture that injustice may have been done. *Id.*
8. The franchise of a corporation is not, within the tax laws, to be

- reckoned as realty. (1 R. S. 387, §§ 1, 2). *Id.*
9. *It seems*, that corporate franchises are not, on general principles, to be considered as real property. *Id.*
10. The commissioners of taxes, of the city and county of New York, in assessing the capital stock of relator, a domestic corporation, operating a railroad across the Isthmus of Panama under its charter and a grant of an exclusive right to construct and operate such a road, fixed the value of its real estate on the Isthmus at the amount paid out by it therefor, and in the construction of its road. The relator proved its net income for three years, including the one for which the assessment was made, and showed that the average income of those years capitalized, would produce a sum much larger than the value as so fixed by the commissioners. The relator claimed, that, by deducting from this sum the actual value of its personalty, the residue represented the value of its real estate. *Held*, untenable; that the value of the franchises of the corporation was an important element in determining the value of its road as a whole, or of its capital stock; that as the income of the relator is derived not only from the use of the real and personal property, but, also, from its franchises, it is impossible to ascertain, from proof of the income alone, the value of either element entering into the aggregate value of the corporate property; and therefore the evidence afforded no legal basis upon which the court could change or reduce the assessment. *Id.*
11. A tax, such as is provided for by the act of 1885 (Chap. 483, Laws of 1885), "to tax gifts, legacies and collateral inheritances in certain cases," may be constitutionally imposed. *In re McPherson* 806
12. Said act is not violative of the provision of the State Constitution (Art. 3, § 20), which provides that every law imposing a tax "shall distinctly state the tax and the object to which it is to be applied." Said provision was intended to apply to the annual recurring taxes known at the time of the adoption of the Constitution and imposed generally on the entire property of the State; it does not apply to a special tax like that provided for in said act. *Id.*
13. The said act provides sufficiently for a notice and hearing, or opportunity to be heard, and so does not invade the constitutional right to "due process of law." (Art. 1, § 6.) *Id.*
14. The said act confers no powers upon Surrogates' Courts prohibited by the Constitution; the imposition and collection of the tax, as provided in the act, is simply an incident in the settlement of the estate of a deceased person, and is not so foreign to the jurisdiction generally exercised by said courts as to make the act obnoxious to any constitutional objection. *Id.*
15. The fact that the act may not have operation as intended by the legislature in some cases does not affect its validity in the cases where it may operate without difficulty or embarrassment. *Id.*
16. The provision of the act of 1855, "in relation to the collection of taxes on lands of non-residents" (§ 83, chap. 427, Laws of 1855), which authorizes the State comptroller where he shall discover that a sale of land for taxes was invalid or ineffectual to give title to the lands sold, to cancel the sale and refund the purchase-money, was intended to relieve the purchaser from the consequences of a defective tax title; the owner of the land is not properly a party to the proceedings; nor is he permitted in this way to test the validity of the sale. *People ex rel. Wright v. Chapin.* 369
17. The provision of the act of 1880 (§ 9, chap. 269, Laws of 1880), in reference to the review and correction of assessments, which re-

- quires completed and verified assessment-rolls of a town to be filed with the town clerk "on or before the first day of September" is directory merely, and when the roll is completed and verified, a delay in filing it does not vitiate the assessment. *People ex rel. R. W. & O. R. R. Co. v. Haupt*. 377
18. Where upon *certiorari* it appeared that the relator had fifteen days after delivery of the assessment-roll to the town clerk within which to sue out his writ, *held*, that he might not complain as he had suffered no prejudice. *Id.*
19. The object of the requirement of said act (§ 9), that the assessors shall give public notice of the completion of the roll is simply to set running the fifteen days within which parties aggrieved may sue out a writ of *certiorari* (§ 2); an omission to give the notice does not affect the validity of the assessment, it simply leaves the right to review by *certiorari* unlimited as to time. *Id.*
20. The conclusions of the assessors upon conflicting evidence as to value of property assessed are not reviewable here. *Id.*
21. The proceedings by which the annual assessment-roll of a town is to be formed, being specially pointed out by statute, whenever the requirements are material they must be strictly pursued to validate a sale of property under the warrant. *People v. Hagadorn*. 516
22. The duty imposed upon the board of supervisors of the county requires not only that it shall establish a ratio upon which the tax is to be based, but also, that it shall compute and enter in the roll, in a column opposite the valuation of real and personal estate, the amount of tax levied thereon; this must be done under the supervision of the board, and before the roll can be certified to as completed. *Id.*
23. The duty of passing upon the question of a corrected assessment-roll, and certifying to its accuracy and completeness as a perfected roll, is a judicial duty which cannot be delegated. *Id.*
24. Where, therefore, it appeared that a board of supervisors fixed the ratio of tax upon the aggregate amount of valuation, and without extending the tax, signed the roll and attached the collector's warrant thereto, and delivered it to the supervisor of the town, with authority to compute and enter the amount of the tax, which he did, and then delivered the roll and warrant to the collector, *held*, that the roll and warrant were fatally defective; that a return of the nonpayment of taxes so levied conferred no authority upon the State comptroller to sell land thus taxed, and that the State as a purchaser at such a sale acquired no title. *Id.*
25. Where the comptroller has in his hands unpaid reported taxes for a number of years upon a piece of land, some of which are legal and some invalid, he may not enforce the payment of the illegal taxes by taking proceedings to collect the legal ones; he cannot compel the owner of the land in order to regain possession of his property to pay a sum of money which the State has no right to demand. *Id.*
26. A sale, therefore, of the land for the taxes of several years, one or more of which is illegal and void, is an excess of jurisdiction and void. *Id.*
27. Also *held*, where the State claimed title to lumber cut from land bid in for it at such a sale, that proof of the comptroller's deed, having as against the State shown that it had once parted with its original property in, and assumed to sell the land as that of a citizen for taxes, it was precluded from claiming that its original proprietorship still remained. *Id.*
28. The object of plaintiff's incorporation, as expressed in its constitution, made pursuant to its charter (Chap. 232, Laws of 1838), is "to provide and maintain a place of refuge for colored orphans

where they shall be boarded and suitably educated." Plaintiff purchased certain real estate in the city of New York, which with the buildings thereon are used for the purpose of its incorporation. By the "House Rules" religious services are required to be held once a day each Sunday and on certain other days specified, but no visitors are allowed to be admitted on Sunday except under pressing circumstances, and with the consent of the superintendent. In an action to have certain taxes imposed upon the land declared void; *held*, that the building upon the land in question was not a "school house," "an incorporated academy or other seminary of learning," or a "building for public worship," within the meaning of the provision of the Revised Statutes in reference to exemptions from taxation (1 R. S. 888, § 4, subd. 3), at least as limited by the provisions of the statute in relation to such exemption in the city of New York (Chap. 282, Laws of 1852, § 827, chap. 410, Laws of 1882), but that it was an "alms-house" within said provision of the Revised Statute (§ 4, subd. 4, as amended by chap. 136, Laws of 1866), and as such it and the land were exempt from taxation. *Ass'n C. O. v. Mayor, etc.* 581

29. Plaintiff took title to the premises by deed dated July 31, 1877; *held*, that as by the general scheme of taxation applicable to said city (now incorporated in chap. 410, Laws of 1882, §§ 814 *et seq.*), the character of real estate for the purpose of taxation is fixed for the year on May 1, and if then assessable it remains so, and there is no power lodged anywhere to take it out of the record book or the roll for that year, the tax was properly laid, and was payable by the plaintiff if it desired to clear its title; and this, without regard to the question as to whether the tax had become a lien when plaintiff took title. *Id.*

See TAX SALES.

ASSIGNMENT.

1. Where the owner of a chose in action, after a transfer for a good consideration of an interest therein to one person, assigns and transfers the same to a *bona fide* purchaser with authority to collect, the latter is not entitled to retain the whole proceeds of collection. The first transferee acquires an equitable lien upon the proceeds of collection to the extent of the interest transferred to him; the second transferee takes subject to such lien, and an action is maintainable against him to enforce the same. *Fairbanks v. Sargent*. 108
2. As between different assignees of a chose in action by express assignment from the same person, the one prior in point of time will be protected although he has given no notice of such assignment to either the subsequent assignee or the debtor. *Id.*
3. One U., being the owner of a claim resting in open account against Z., who disputed his liability, entered into a contract with plaintiff, an attorney, by which, among other things, it was agreed that plaintiff, for his services in endeavoring to collect the claim should, in case suit was brought thereon, have one-third of whatever should be collected or in any way realized thereon. U. retained the right to decide upon the terms and mode of settlement and to name the attorney, in case suit was brought in another State. Plaintiff thereafter, by the direction of U., caused suit to be brought upon the claim in New Jersey, through an attorney selected by U., and while such suit was pending, the latter, by a written assignment, absolute in form, made without plaintiff's assent or knowledge, transferred his interest in the claim to S., at whose request U., agreed to a settlement by authorizing S. to accept certain bonds in satisfaction of the claim. In pursuance of this agreement, U. directed the attorneys in New Jersey to discontinue the suit, and executed a release of all claims against Z.,

to be delivered to him upon his delivery of the said bonds; S. executed a release of all his claims against U. and reassignments of certain other claims held by him also as collateral, which were considered of no value, to be delivered to U., after he should have received and forwarded the bonds to S. The arrangement was consummated, and S. received the bonds in ignorance of any interest of plaintiff in the claim. *Held*, that an action was maintainable on the part of plaintiff to recover one-third of the bonds so received by S., or the value thereof; that the agreement between plaintiff and U. constituted an equitable assignment and gave plaintiff an equitable lien upon the proceeds of the settlement to the extent of the one-third, and S. took subject to such interest; that it was not necessary in order to make such assignment or lien valid, that notice thereof should be given to the debtor; and that the facts that U., reserved the right to name the attorney to bring the suit, and to determine the terms and mode of settlement did not in any manner detract from the validity of the agreement with plaintiff as an equitable assignment. *Id.*

4. The case of *Bush v. Lathrop* (22 N. Y. 585), stands in full force save as modified by subsequent decisions, excluding from the operation of the principles there laid down the case of a purchase in good faith of a non-negotiable instrument from an assignee of the real owner upon whom such owner has conferred, by his assignment, the apparent absolute ownership, where the purchase has been made in reliance upon such apparent ownership. *Id.*

5. Also, *held*, that the real nature of the transaction between U. and S. was not a transfer from the former to the latter of the securities received from Z., but that S., in fact and in law, received them from Z. *Id.*

6. *It seems*, that even if it could be held that S. received from U. the said bonds, he was not a *bona fide*

holder, as they were not acquired by him for a valuable consideration or in the ordinary course of business. *Id.*

7. A policy of insurance, issued on the tontine plan, on the life of S. recited that it was issued in consideration of a sum stated to have been paid by C. and six others named, the children of S. who were declared to be the assured; to whom the company agreed to pay the amount of assurance upon the death of the insured, or that in case he should be living at the time of the maturity of the policy, the holder or holders of the policy should be entitled to withdraw in cash the policy's share of the fund. In an action to determine as to who was entitled to this share, plaintiffs claimed under an assignment of the policy from S. to their testator, and defendant under assignments from the assured. *Held*, that plaintiffs acquired no right to the policy or the fund under the assignment from S., as the contract of the company was not with him, but by its express terms with the assured. *Perdon v. Canfield*. 143

8. Plaintiffs claimed that the assignments to defendant were in some respects invalid. *Held*, that conceding this to be so, it was immaterial; it did not improve plaintiffs' title or authorize them to recover. *Id.*

ASSIGNMENT (FOR BENEFIT OF CREDITORS).

1. An agreement, made at the time of the purchase of goods on credit between the vendor and purchaser, that in case of the insolvency of the latter, or of an assignment becoming necessary, he will protect the former by a preference to the amount of the goods sold and unpaid for, is not in law a fraud upon other creditors, nor is it so far conclusive evidence of fraud as to avoid a preferential assignment made in pursuance thereof. *Nat. Park Bk. v. Whitmore*. 297

2. The affidavits upon which an attachment was issued set forth the making of such an agreement by the defendants with W., another creditor. The following facts also appeared on motion to vacate the attachment. A few days before the assignment was made defendants reported that they were entirely solvent and could pay all their debts in full, and made a statement of their affairs showing a large surplus of assets over liabilities, soon after this claiming they could not pay their debts in full and were insolvent, they proposed to their creditors a compromise, and threatened, unless their offer was accepted, to make an assignment preferring W., stating that then the other creditors would get little or nothing. The assignment was made to a foreign assignee two days after the attachment was issued. The evidence tended to show that the assignors had been engaged in a prosperous business, and they gave no satisfactory or intelligible explanation of their sudden alleged insolvency. After the assignment was made defendants and the assignee co-operated apparently to coerce a compromise, and offered to "fix it up" with a creditor if he would consent thereto. *Held*, the facts justified a finding that the assignment was threatened and made by defendants, while not actually insolvent, to coerce a favorable compromise and thus secure a benefit to themselves; at least there was sufficient to give the court below jurisdiction to award the attachment, and its exercise was not reviewable here. *Id.*

8. An assignment for the benefit of creditors contained a provision that, "should it be necessary and to the better performance of the trust," the assignee shall have power "to finish such work as is unfinished," paying the necessary charges and expenses before paying the debts and liabilities as provided for in the assignment. In an action to set aside the assignment as fraudulent, *held*, that no power to determine as to the necessity was vested in the as-

signee by the instrument; but that the power conferred was conditioned upon a necessity to be determined by the court; that the assignee could not safely exercise it except under order of the court, and in case he attempted so to do might be restrained at any moment; and that, therefore, the provision did not vitiate the assignment. *Robbins v. Butcher.* 575

4. Under the provision of the act in relation to assignments for the benefit of creditors (§ 29, chap. 486, Laws of 1877, as amended by chap. 328, Laws of 1884), which provides that in all assignments made pursuant to the act, the wages or salaries due to employees shall be preferred before any other debt, the instrument of assignment itself is not rendered void by the omission to insert therein a clause giving such preference; the instrument is to be read in connection with the statute, as if the said provision formed part of it, and so, the statutory preference is impressed upon the trust fund in the hands of the assignee. *Richardson v. Thurber.* 606

5. A statute imposing such a preference upon a voluntary assignment is not unconstitutional; the legislature may permit it to be made only on expressed conditions, and the assignor, by the act of making the assignment, accepts the conditions. *Id.*

ATTACHMENT.

The affidavits upon which an attachment was issued set forth the making of an agreement by the defendants with W., another creditor, upon sale of goods, that in case of insolvency defendants would make an assignment preferring W. The following facts also appeared on motion to vacate the attachment. A few days before the assignment was made defendants reported that they were entirely solvent and could pay all their debts in full, and made a statement of their affairs showing

a large surplus of assets over liabilities, soon after this claiming they could not pay their debts in full and were insolvent, they proposed to their creditors a compromise, and threatened, unless their offer was accepted, to make an assignment preferring W., stating that then the other creditors would get little or nothing. The assignment was made to a foreign assignee two days after the attachment was issued. The evidence tended to show that the assignors had been engaged in a prosperous business, and they gave no satisfactory or intelligible explanation of their sudden alleged insolvency. After the assignment was made defendants and the assignee co-operated apparently to coerce a compromise, and offered to "fix it up" with a creditor if he would consent thereto. *Held*, the facts justified a finding that the assignment was threatened and made by defendants while not actually insolvent, to coerce a favorable compromise and thus secure a benefit to themselves; at least there was sufficient to give the court below jurisdiction to award the attachment, and its exercise was not reviewable here. *Nat. Park Bank v. Whitmore.* 297

ATTORNEYS.

The provision of the original charter of Long Island City (chap. 719, Laws of 1870), giving to the common council power to employ and pay an attorney is repugnant to and was repealed by the amended charter (chap. 461, Laws of 1871), and under the latter the common council is placed under an absolute disability to create any debt or liability on the part of the city for legal services. *Lyday v. L. I. City.* 218

ATTORNEY AND CLIENT.

One U., being the owner of a claim resting in open account against Z., who disputed his liability, entered into a contract with plaintiff, an attorney, by which, among

other things, it was agreed that plaintiff, for his services in endeavoring to collect the claim should, in case suit was brought thereon, have one-third of whatever should be collected or in any way realized thereon. U retained the right to decide upon the terms and mode of settlement and to name the attorney, in case suit was brought in another State. Plaintiff thereafter, by the direction of U., caused suit to be brought upon the claim in New Jersey, through an attorney selected by U., and while such suit was pending, the latter, by a written assignment, absolute in form, made without plaintiff's assent or knowledge, transferred his interest in the claim to S., at whose request U., agreed to a settlement by authorizing S., to accept certain bonds in satisfaction of the claim. In pursuance of this agreement, U., directed the attorneys in New Jersey to discontinue the suit, and executed a release of all claims against Z., to be delivered to him upon his delivery of the said bonds; S. executed a release of all his claims against U. and reassignments of certain other claims held by him also as collateral, which were considered of no value, to be delivered to U., after he should have received and forwarded the bonds to S. The arrangement was consummated, and S. received the bonds in ignorance of any interest of plaintiff in the claim. *Held*, that an action was maintainable on the part of plaintiff to recover one-third of the bonds so received by S., or the value thereof; that the agreement between plaintiff and U. constituted an equitable assignment and gave plaintiff an equitable lien upon the proceeds of the settlement to the extent of the one-third, and S. took subject to such interest; that it was not necessary in order to make such assignment or lien valid, that notice thereof should be given to the debtor; and that the facts that U. reserved the right to name the attorney to bring the suit, and to determine the terms and mode of settlement did not in any manner detract from the validity of the agreement with plaintiff as an

equitable assignment. *Fairbanks v. Sargent.* 108

BANKS AND BANKING.

1. D. conveyed certain premises to plaintiff by warranty deed, receiving a mortgage thereon for part of the purchase-money. There were at the time two mortgages on the premises, one owned by defendant. Plaintiff paid the amount of his mortgage before due to defendant, who then held it as collateral security for obligations of D., in consideration of an oral agreement on its part to release the premises from its mortgage, and to procure a release of the other mortgage. It released its own, but did not procure a release of the other, which was subsequently foreclosed and the premises sold. In an action to recover damages for a breach of the agreement, *held*, that the contract was not *ultra vires*. *McCraith v. Nat. M. V. Bk.* 414

2. A bank had been for a series of years annually appointed a depository of the State for canal tolls, and had annually executed and delivered to the State a contract, guaranteed by some of its directors in their individual character. Each guaranty recited the designation of the bank, and its contract to receive and account for the tolls, and the guarantors covenanted jointly and severally that the bank would faithfully perform its contract, account for and pay over all moneys deposited with it, and also "account for and pay over all moneys now on deposit in said bank, or due or to become due therefrom to the people." In an action upon a guaranty so given, *held*, the guarantors were bound for the continuing security of the deposit existing at the time; and so, they were liable for the whole balance due from the bank to the State at the beginning of the year, as well as for subsequent deposits. *People v. Lee.* 441

3. Plaintiff held a bond and guaranty, delivered to it by the First

National Bank, to secure deposits, which the latter undertook to repay with five per cent. interest. At the request of plaintiff said bank executed to it a new bond which recited that it was executed in consideration of deposits made, or that might be made, which the obligor undertook to repay on demand, with interest at four per cent. On the bond was indorsed a guaranty, the consideration expressed therein being the making of the deposits mentioned in the bond. Four days after the receipt of the new bond and guaranty the others were surrendered. No deposits were made after the delivery of the new bond and guaranty, and the bank failed about a month thereafter. In an action upon the guaranty, *held*, it was a legitimate inference from the circumstances that the new bond was intended by the parties as a substitute for the original one, and the surrender of the latter was a good consideration for the guaranty; also, that it was immaterial whether the guarantors knew or did not know that the surrender of the old bond was in the contemplation of the parties when they became guarantors. *Erie Co. Sav. Bk. v. Coit.* 532

See SAVINGS BANKS.

BANKRUPTCY.

1. In an action to compel the specific performance, on the part of the vendee, of a contract for the sale of lands, plaintiff claimed title under a deed from an assignee in bankruptcy. It appeared that in 1842 the then owner of the land was adjudged a bankrupt, and the official general assignee in bankruptcy became vested with the title; no debts were proved against the estate of the bankrupt before his discharge and but one small one thereafter. In 1844 the assignee advertised and sold the land at auction and it was bid off by one R. for \$1. In 1866, T. claiming to have purchased the bid of R. from his administratrix, applied for and obtained a deed from the assignee which was

recorded in 1869. No possession accompanied the title under the assignee's sale. *Held*, that the title was defective and defendant could not be compelled to complete the purchase; that if there was a binding contract for the sale of the land by the assignee to R., the administratrix of the latter had no interest in the land, as the interest of her intestate was real estate and went to his heirs; and that, therefore, she conveyed no right or interest by her assignment, and the assignee in bankruptcy had no authority to convey to T. *Pulmer v. Morrison*. 183

2. As to whether under the late bankrupt act a sale by an assignee in bankruptcy of the real estate of a bankrupt, made without an order of the bankruptcy court directing it, is void or not, *quære*. *Id.*

BILLS, NOTES AND CHECKS.

1. In an action by executors or administrators against the maker of a note or the drawer of a check, executed for defendant by his agent, where the defense is payment, the agent is not precluded from testifying on behalf of his principal to personal transactions and communications with the decedent showing payment by the agent; he is not "interested in the event" within the meaning of the Code of Civil Procedure (§ 829). *Nearpass v. Gilman*. 506
2. In such an action the indorser of the paper, not a party, is also a competent witness for the defendant as to such transactions or communications, where it does not appear that he has been charged as indorser; his indorsement simply does not make him even presumptively liable, and, until presentation, protest and notice is shown, he does not stand in the attitude of one interested in the event. *Id.*
3. Words added to the name of the payee in a promissory note, showing that he is executor are mere *descriptio personæ*, and an action may be maintained thereon by the payee in his individual capacity. *Litchfield v. Flint*. 543
4. Prior and up to the death of a testator, K., his executor was his general agent. As such he placed in the hands of an attorney a claim for collection. The attorney was directed by the testator to pay the proceeds to K.; this he did by sending a check for the avails of collection to the office of K., payable to his order. The testator died on the same day after the delivery of the check. Two days thereafter K. drew the money on the check and credited it in his account with the testator, which prior to the credit showed a balance due K. The testator died insolvent. *Held*, that the surrogate properly allowed the credius; that when the check was delivered K. could treat it as funds in his hands to be applied, so far as needed, in payment of what the testator then owed him, and when the money was drawn upon the check the payment related back to the delivery of the check, and he drew it as payee, not as executor. *In re Kellogg*. 648
5. Indorsements of payments upon a note, made by the holder at a time when it was against his interest to make them, are *prima facie* evidence of the payments. *Id.*

BLACKMAILING.

To sustain a conviction under the Penal Code (§ 558), for sending a threatening letter, it is not essential that the threat on its face be to do an illegal act. An accusation in writing of an act involving moral turpitude, known by the writer to be false, accompanied with a suggestion that legal proceedings will be taken, unless the person against whom it is made purchase silence, may be a threat within the statute, although, in form, the accused is only called upon to render satisfaction for that which, if the charge was true, would entitle the accuser to pre-

cuniary compensation. *People v. Wightman*. 598.

BOARD OF SUPERVISORS.

See SUPERVISORS.

BONA FIDE HOLDER.

1. Where the owner of a chose in action, after a transfer for a good consideration of an interest therein to one person, assigns and transfers the same to a *bona fide* purchaser with authority to collect, the latter is not entitled to retain the whole proceeds of collection. The first transferee acquires an equitable lien upon the proceeds of collection to the extent of the interest transferred to him; the second transferee takes subject to such lien, and an action is maintainable against him to enforce the same. *Fairbanks v. Sargent*. 108
2. As between different assignees of a chose in action, by express assignment from the same person, the one prior in point of time will be protected although he has given no notice of such assignment to either the subsequent assignee or the debtor. *Id.*
3. One U., being the owner of a claim resting in open account against Z., who disputed his liability, entered into a contract with plaintiff, an attorney, by which, among other things, it was agreed that plaintiff, for his services in endeavoring to collect the claim should, in case suit was brought thereon, have one-third of whatever should be collected or in any way realized thereon. U. retained the right to decide upon the terms and mode of settlement and to name the attorney, in case suit was brought in another State. Plaintiff thereafter, by the direction of U., caused suit to be brought upon the claim in New Jersey, through an attorney selected by U., and while such suit was pending, the latter, by a written assignment, absolute in form,

made without plaintiff's assent or knowledge, transferred his interest in the claim to S., at whose request U. agreed to a settlement by authorizing S. to accept certain bonds in satisfaction of the claim. In pursuance of this agreement U. directed the attorneys in New Jersey to discontinue the suit, and executed a release of all claims against Z., to be delivered to him upon his delivery of the said bonds; S. executed a release of all his claims against U. and reassignments of certain other claims held by him also as collateral, which were considered of no value, to be delivered to U., after he should have received and forwarded the bonds to S. The arrangement was consummated, and S. received the bonds in ignorance of any interest of plaintiff in the claim. *Held*, that an action was maintainable on the part of plaintiff to recover one-third of the bonds so received by S., or the value thereof; that the agreement between plaintiff and U. constituted an equitable assignment and gave plaintiff an equitable lien upon the proceeds of the settlement to the extent of the one-third, and S. took subject to such interest; that it was not necessary in order to make such assignment or lien valid, that notice thereof should be given to the debtor; and that the facts that U. reserved the right to name the attorney to bring the suit, and to determine the terms and mode of settlement did not in any manner detract from the validity of the agreement with the plaintiff as an equitable assignment. *Id.*

4. The case of *Bush v. Lathrop* (22 N. Y. 535), stands in full force save as modified by subsequent decisions; excluding from the operation of the principles there laid down the case of a purchase in good faith of a non-negotiable instrument from an assignee of the real owner upon whom such owner has conferred, by his assignment, the apparent absolute ownership, where the purchase has been made in reliance upon such apparent ownership. *Id.*

5. *It seems* that even if it could be held that S. received from U. the said bonds, he was not a *bona fide* holder, as they were not acquired by him for a valuable consideration in the ordinary course of business. *Id.*

BONDS.

See TOWN BONDING.

BURGLARY.

1. Where, upon the trial of an indictment for burglary, the "breaking," which is the essential element of that crime, was established by uncontradicted evidence. *Held*, that it was not error for the court to refuse to charge the jury that they might convict of misdemeanor, under the provision of the Penal Code (§ 505), declaring a person guilty of a misdemeanor who enters a building under circumstances, or in a manner not amounting to a burglary, for the purpose of committing a felony, larceny, or any malicious mischief. *People v. Meegan.* 529
2. Also *held*, such a refusal to charge was not error, where a modification of the indictment by striking out the characteristics of burglary would not have left an adequate description of the misdemeanor. *Id.*

CANALS.

- 1 A bank had been for a series of years annually appointed a depository of the State for canal tolls, and had annually executed and delivered to the State a contract, guaranteed by some of its directors in their individual character. Each guaranty recited the designation of the bank, and its contract to receive and account for the tolls, and the guarantors covenanted jointly and severally that the bank would faithfully perform its contract, account for and pay over all moneys deposited with it, and also "account for

and pay over all moneys now on deposit in said bank, or due or to become due therefrom to the people." In an action upon a guaranty so given, *held*, the guarantors were bound for the continuing security of the deposit existing at the time; and so they were liable for the whole balance due from the bank to the State at the beginning of the year, as well as for subsequent deposits. *People v. Lee.* 441

2. Also *held*, that it was not competent for defendants to allege ignorance of the existence, at the time of the execution of the guaranty, of a debt so expressly provided for, or that they had been misled by an omission of their principal to notify them of its existence. *Id.*
- 3 The act of 1813, incorporating the S. L. N. Co. (Chap. 144, Laws of 1813), gave to that corporation the right to use only so much of the waters of Seneca river, for the purposes of navigation on its canal, and forbade its use by it for any other purpose. *Silsby Mfg. Co. v. State.* 563
- 4 The State having acquired, under the act of 1825 (Chap. 271, Laws of 1825), "the stock property and privileges belonging or appertaining to," said company, and only that has no authority to use any more of the waters of said river than are necessary for the purposes of navigation, and has the right to use them only for that purpose. *Id.*
5. Upon trial, before the board of claims, of a claim for an unlawful diversion by the State of the waters of said river, it appeared that on account of defects in the locks, gates, walls, etc., of said canal more water was diverted from the river than the superintendent of public works, in the exercise of his discretion, required for the use of the canal and more than was necessary for navigation, and that if said structures had been in a condition not to leak, the claimant, a riparian proprietor and mill owner on the river, would have had the use of a portion of the surplus water so diverted. *Held*, that the claimant made out a

case which would have created a legal liability as against an individual; and so, that under the act of 1870 (Chap. 821, Laws 1870), he was entitled to his damages; also, that the State was not the sole judge of the necessity and of the amount to be taken, but it was incumbent upon it to prevent leakage or other wastage to a more than fair and reasonable extent; and that a finding of negligence on the part of any officer of the State was not necessary. *Id.*

6. The diversion for which the claim was made was for the years 1882, 1883 and 1884. The claim was filed in August, 1884. *Held*, that the statute of limitations was not a bar to the claims for 1883 and 1884, that each day the unlawful use was continued a new cause of action arose; and that, as no recovery could be had for future damages, a failure to file a claim within the time limited by the statute, after the commencement of the unlawful diversion, had no effect on the rights of the claimant to recover damages sustained within the two years limited. *Id.*

CASES REVERSED, DISTINGUISHED, ETC.

- In re Gilbert El. R. R. Co.* (70 N. Y. 361), distinguished. *In re N. Y. Cable Co. v. Mayor, etc.* 40
- In re N. Y. El. R. R. Co.* (70 N. Y. 327), distinguished. *In re N. Y. Cable Co. v. Mayor, etc.* 41
- In re B. W. & N. R. Co.* (72 N. Y. 245), distinguished. *In re N. Y. Cable Co. v. Mayor, etc.* 43
- Hawley v. James* (16 Wend. 61), distinguished. *Van Cott v. Prentice.* 57
- State v. N. H. & N. R. R. Co.* (37 Conn. 153), distinguished. *People v. N. Y., L. E. & W. R. R. Co.* 65
- People v. D. & C. R. R. Co.* (58 N. Y. 152), distinguished. *People v. N. Y., L. E. & W. R. R. Co.* 76
- People ex rel. Kimball v. B. & A. R. R. Co.* (70 N. Y. 569), distinguished. *People v. N. Y., L. E. & W. R. R. Co.* 67
- People ex rel. Garbutt v. R. & S. L. R. R. Co.* (76 N. Y. 204), distinguished. *People v. N. Y., L. E. & W. R. R. Co.* 67
- People ex rel. Millard v. Chapin* (40 Hun, 386), reversed. *People ex rel. Millard v. Chapin.* 96
- Fairbanks v. Sargent* (30 Hun, 588), reversed. *Fairbanks v. Sargent.* 108
- Savage v. Burnham* (17 N. Y. 561), distinguished. *Konvalinka v. Schlegel.* 131
- Tobias v. Ketcham* (32 N. Y. 819), distinguished. *Konvalinka v. Schlegel.* 131
- Smith v. Long* (12 Abb. N. C. 113), explained. *Palmer v. Morrison.* 136
- Lerche v. Brasher* (37 Hun, 385), reversed. *Lerche v. Brasher.* 157
- People ex rel. Andrews v. Lord* (9 Mich. 227), distinguished. *People ex rel. Bridgeman v. Hall.* 177
- Stadler v. City of Detroit* (13 Mich. 340), distinguished. *People ex rel. Bridgeman v. Hall.* 177
- Dickinson v. Mayor, etc.* (92 N. Y. 584), distinguished. *Brehm v. Mayor, etc.* 191
- In re Wilbur v. Warren* (40 Hun, 203), reversed. *In re Wilbur v. Warren.* 192
- Cole v. Malcolm* (66 N. Y. 363), distinguished. *In re Wilbur v. Warren.* 199
- Bloomer v. Sturges* (58 N. Y. 168), distinguished and limited. *In re Gilbert.* 210
- Robert v. Sadler* (37 Hun, 377), reversed. *Robert v. Sadler.* 220
- N. F. S. Bridge Co. v. Bachman* (4 Lans. 523), distinguished. *Robert v. Sadler.* 233

Denniston v. Clark (125 Mass. 216), distinguished. *Robert v. Sadler*. 233

City of New Haven v. Sargent (38 Conn. 50), distinguished. *Robert v. Sadler*. 234

Kunz v. City of Troy (36 Hun. 615), reversed. *Kunz v. City of Troy*. 344

Nicholson v. Erie R. Co. (41 N. Y. 525), distinguished. *Byrne v. N. Y. C. & H. R. R. Co.* 366

Sutton v. N. Y. C. & H. R. R. Co. (6 N. Y. 243), distinguished. *Byrne v. N. Y. C. & H. R. R. Co.* 366

Larmore v. C. P. Iron Co. (101 N. Y. 391), distinguished. *Byrne v. N. Y. C. & H. R. R. Co.* 366

Branch v. Levy (14 J. & S. 428), overruled. *Becker v. Koch*. 403

Jones v. Fleming (37 Hun. 227), reversed. *Jones v. Fleming*. 418

Hubbell v. City of Yonkers (35 Hun. 319), reversed. *Hubbell v. City of Yonkers*. 434

Kennedy v. Mayor, etc. (73 N. Y. 365), distinguished. *Hubbell v. City of Yonkers*. 439

Macauley v. Mayor, etc. (67 N. Y. 602), distinguished. *Hubbell v. City of Yonkers*. 459

Burrows v. Whitaker (71 N. Y. 291), distinguished. *Cornell v. Clark*. 457

Dunham v. Waterman (17 N. Y. 9), distinguished. *Robbins v. Butcher*. 578

Cogsuwell v. Cogsuwell (2 Edw. Ch. 231), distinguished. *In re Kernochan*. 624

Lawrence v. Cooke (32 Hun. 126), reversed. *Lawrence v. Cooke*. 632

Murtha v. Curley (93 N. Y. 359), distinguished. *In re Water Com'rs of Amsterdam*. 677

CAUSE OF ACTION.

1. In the case of public improvements, authorized by statute, which provides a mode of compensation to persons injured, that mode is exclusive and no right of action exists in their favor except that directed in the statute; *held*, that no right of action at law existed against the city of New York to recover damages incidentally occasioned to land by changes in the grade in Eighth avenue, made under the act of 1873 (Chap. 729, Laws of 1873). *Heiser v. Mayor, etc.* 68
2. Also *held*, that an equitable action was not maintainable to vacate an award and assessment made by said board, by reason of alleged fraud on the part of the assessors in making it, as the party aggrieved had a sufficient remedy at law. *Id.*
3. The will of S. directed his executors to sell his real and personal estate, and, after paying his debts, funeral expenses and certain legacies, to divide the balance among the defendants herein. The executors sold and conveyed the real estate to one B. Defendants thereupon brought an action against the executors and B. to set aside the conveyance. The judgment therein granted the relief sought, and also decided that the land descended to the devisees, subject to the execution of the power, as the time for the execution thereof had expired, and that they were entitled to the possession as rightful owners, freed from the trusts. In an action under the Code of Civil Procedure (§ 1843) to charge defendants as such devisees with a debt of the testator. *Held*, it was to be assumed that the provision, above referred to, was inserted in said judgment at the request and by the procurement of the defendants and when they took possession under the judgment this established their election to avoid a sale and take their legacies in the land itself instead of the proceeds; that they had the right to do this, no other rights intervening, or being prejudiced, that it might be, while

- this reconversion changed the legatees to devisees, it did not divest the heirs-at-law of their legal title, yet such legal title was purely formal, and the effect of defendants' election was, at least, to vest in them the equitable ownership and the entire beneficial interest, and therefore the action was maintainable. *Armstrong v. McKelvey*. 179
4. When the Legislature has conferred authority upon a board of supervisors as to all incidents and details, and the mode of accomplishing a purpose, if the board acts within the scope of the legislative enactment, its action may not be reviewed. *Hubbard v. Sadler*. 223
5. Where the defendants, in the performance of a contract with the public authorities for the construction of a highway across plaintiff's land, the surface of which was above the grade of the highway, not only removed the gravel and other materials above grade, but, also, dug and were digging pits in the highway to the depth of six feet below grade to get gravel with which to cover the roadway on lands not owned by plaintiff. *Held*, that plaintiff could maintain an action to restrain the further removal of the gravel. *Robert v. Sadler*. 229
6. H., defendant's intestate, executed to the executors of S. two written instruments, by each of which he promised to pay to them as such executors at his death, if he died without heirs, a sum specified, which the instrument described as a fund held by the executors in trust, in which H. had a life estate, with remainder over to his heirs. H. died leaving an heir. In an action to recover the sum specified, *held*, that, as the condition in the instrument, if carried out, would cause the fund to fall into the estate of H., subject to administration, it would result in an unlawful disposition of the money, and so it was illegal and void, that the money was repayable on the death of H., irrespective of the question whether
- he left heirs or not; and that plaintiff was entitled to recover. *Lee v. Horton*. 538
7. Plaintiff's complaint alleged his appointment as executor of the will of H., the execution to him by the K. C. C. R. R. Co. of a promissory note, a copy of which was set forth in the complaint, which was made payable to him or order, he being described as executor of H.; the transfer and delivery of the note to F., who held the same at the time of the making of an agreement between plaintiff and defendant; in pursuance of which agreement plaintiff transferred and assigned to defendant certain stock and bonds of the company and claims against it. In consideration whereof defendant, by the said agreement, promised, among other things, that when his interest in the road and in the securities was closed up he would apply the proceeds, with the consent of the company, to the payment of the note, provided F. would relinquish certain bonds of the company. The complaint further alleged that said agreement was entered into by plaintiff individually, for the purpose of making certain provision for the payment of the note; that the note and the bonds referred to were thereafter assigned to him by F.; that when the note became due payment was demanded and refused, it was duly protested and notice of nonpayment served upon plaintiff; that the interest specified in the agreement had been closed up, and defendant had received on account of the property, over and above all advances and expenditures, a sum more than sufficient to pay said note; that the consent of the company to such payment had been obtained, and that a tender of the bonds was made, with demand of payment, but that defendant refused to pay. On demurrer to the complaint, *held*, that it set forth a good cause of action, that if plaintiff simply occupied the position of assignee from F., the promise of defendant became available to, and could have been enforced by F.; and by the transfer of the note to plaintiff

he acquired that right; that even if this were not so, plaintiff, having become possessed of the note, could enforce the promise to pay it, not simply as assignee of F., but as a party to the agreement. *Litchfield v. Flint*. 543.

CERTIORARI.

1. Where, the owner of lands sold for taxes presented his petition to the comptroller, asking that the sale be canceled in pursuance of the authority conferred upon the comptroller by said act, and that officer denied the prayer of the petition. *Held*, that no right of the petitioner was finally determined, nor was he a person aggrieved by the decision, within the meaning of the provisions of the Code of Civil Procedure (§§ 2122, 2127), regulating the review by *certiorari* of the determination of a body or officer; and so, that he had no right to a review of the determination of the comptroller. *People ex rel. Wright v. Chapin*. 369
2. *It seems* that neither the act of 1873 (Chap. 120, Laws of 1873), nor that of 1885 (Chap. 448, Laws of 1885), give to the comptroller any new power in this respect; that while the owner may, the same as any other person, put the comptroller in the way to discover errors in the sale, he cannot compel an investigation, or if one is had, review the comptroller's decision. *Id.*
3. The provision of the act of 1880 (§ 9, chap. 269, Laws of 1880), in reference to the review and correction of assessments, which requires completed and verified assessment-rolls of a town to be filed with the town clerk "on or before the first day of September" is directory merely, and when the roll is completed and verified, a delay in filing it does not vitiate the assessment. *People ex rel. R. W. & O. R. R. Co. v. Haupt*. 377
4. Where upon *certiorari* it appeared that the relator had fifteen days after delivery of the assessment-

roll to the town clerk within which to sue out his writ, *held*, that he might not complain as he had suffered no prejudice. *Id.*

5. The object of the requirement of said act (§ 9), that the assessors shall give public notice of the completion of the roll is simply to set running the fifteen days within which parties aggrieved may sue out a writ of *certiorari* (§ 2); an omission to give the notice does not affect the validity of the assessment, it simply leaves the right to review by *certiorari* unlimited as to time. *Id.*

CHECKS.

See BILLS, NOTES AND CHECKS.

CODE.

See CODE OF CIVIL PROCEDURE.
CODE OF CRIMINAL PROCEDURE.
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CODE OF CIVIL PROCEDURE.

§ 190.	<i>In re Gilbert.</i>	200
§ 190.	<i>Kelsey v. Sargent.</i>	663
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§ 983.	<i>Lerche v. Brasher.</i>	157
§ 1001.	<i>Kelsey v. Sargent.</i>	663
§ 1279, 1281.	<i>C. S. Co. v. Voorhis.</i>	525
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§ 2570.	<i>In re Gilbert.</i>	200
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CODE OF CRIMINAL PROCEDURE.

- §§ 6, 7. *People v. Johnson.* 213
- §§ 273, 281, 298, 294, 295. *People v. Johnson.* 213
- §§ 399, 472. *People v. Everhardt.* 591
- § 542. *People v. Johnson.* 213

COMMISSIONERS OF EXCISE.

The office of commissioners of excise is within the purview of the act "to center responsibility in the municipal government of the city of New York" (Chap. 43, Laws of 1884), and where an appointment to that office was made by the mayor after said act went into effect (January 1, 1885.) *held*, that a confirmation by the common council was not required to entitle the appointee to the office. *People ex rel. Haughton v. Andrews.* 570

COMMON CARRIER.

At common law a carrier of passengers and freight is under no obligation to provide depots for passengers awaiting transportation or warehouses for freight. *People v. N. Y., L. E. & W. R. R. Co.* 58

COMPTROLLER.

1. The sufficiency of the evidence upon which is based a decision of the State comptroller as to who is entitled to the purchase-money paid upon an invalid sale of land for taxes, which he is required to refund out of the state treasury (§§ 80, 83, 85, chap. 427, Laws of 1855), may not be reviewed by *mandamus*; nor can the decision, even if wrong, be so rectified. *People ex rel. Millard v. Chapin.* 96
2. The mere record of a deed from the purchaser at an invalid tax sale, is not notice to the comptroller of the right of the grantee to have the purchase-money refunded to him *Id.*

3. The provision of the act of 1885, "in relation to the collection of taxes on lands of non-residents" (§ 83, chap. 427, Laws of 1855), which authorizes the State comptroller when he shall discover that a sale of land for taxes was invalid or ineffectual to give title to the lands sold, to cancel the sale and refund the purchase-money, was intended to relieve the purchaser from the consequences of a defective tax title. The owner of the land is not properly a party to the proceedings, nor is he permitted in this way to test the validity of the sale. *People ex rel. Wright v. Chapin.* 369

4. Where, therefore, the owner of lands sold for taxes presented his petition to the comptroller, asking that the sale be canceled in pursuance of the authority conferred upon the comptroller by said act, and that officer denied the prayer of the petition. *Held*, that no right of the petitioner was finally determined, nor was he a person aggrieved by the decision, within the meaning of the provisions of the Code of Civil Procedure (§§ 2122, 2127), regulating the review by *certiorari* of the "determination of a body or officer;" and so that he had no right to a review of the determination of the comptroller. *Id.*

5. *It seems* that neither the act of 1873 (Chap. 120, Laws of 1873), nor that of 1885 (Chap. 448, Laws of 1885), give to the comptroller any new power in this respect; that while the owner may, the same as any other person, put the comptroller in the way to discover errors in the sale, he cannot compel an investigation, or if one is had, review the comptroller's decision. *Id.*

6. Where the comptroller has in his hands unpaid reported taxes for a number of years upon a piece of land, some of which are legal and some invalid, he may not enforce the payment of the illegal taxes by taking proceedings to collect the legal ones; he cannot compel the owner of the land in order to regain possession of his property

- to pay a sum of money which the State has no right to demand. *People v. Hagadorn.* 516
7. A sale, therefore, of the land for the taxes of several years, one or more of which is illegal and void, is an excess of jurisdiction and void. *Id.*
8. Also, *held*, where the State claimed title to lumber cut from land bid in for it at such sale, that proof of the comptroller's deed, having as against the State shown that it had once parted with its original property therein, and assumed to sell the land as that of a citizen for taxes, it was precluded from claiming that its original proprietorship still remained. *Id.*
2. The necessity of an order of the Court of Common Pleas of the city of New York, allowing an appeal to this court as required by the Code of Civil Procedure (§ 190), was not dispensed with by the act of 1886 (chap. 418, Laws of 1886), in reference to appeals from judgments of the General Term of the City Court; as the main object of the act, which is to dispense with appeals from such judgments to the Court of Common Pleas, has failed because unconstitutional, and as all the provisions are connected, being part of a single scheme, the incidental provision must fail also *Jones v. Jones.* 234
3. A tax, such as is provided for by the act of 1885 (Chap. 483, Laws of 1885), "to tax gifts, legacies and collateral inheritances in certain cases," may be constitutionally imposed. *In re McPherson.* 306
4. Said act is not violative of the provision of the State Constitution (Art. 8, § 20), which provides that every law imposing a tax "shall distinctly state the tax and the object to which it is to be applied." Said provision was intended to apply to the annual recurring taxes known at the time of the adoption of the Constitution and imposed generally on the entire property of the State; it does not apply to a special tax like that provided for in said act. *Id.*
5. The said act provides sufficiently for a notice and hearing, or opportunity to be heard, and so does not invade the constitutional right to "due process of law." (Art. 1, § 6.) *Id.*
6. The said act confers no powers upon Surrogate Courts prohibited

CONSIDERATION.

1. An executory covenant, supported only by a meritorious, as distinguished from a valuable or pecuniary consideration, cannot be enforced either at law or in equity. *In re Wilbur v. Warren.* 192
2. Where a contract of guaranty is entered into concurrently with the principal obligation, a consideration which supports the latter supports the former; and the consideration need not be expressed in the guaranty, but may be shown by parol. *Erie Co. Segs. Bk. v. Coit.* 532

CONSTITUTION.

The smallness of the value of the fee in a highway does not justify a seizure of the fee without due and lawful authority or its destruction by indirect rulings. *Roberts v. Sadler.* 229

CONSTITUTIONAL LAW.

1. The provisions of the Code of Criminal Procedure, allowing an amendment of an indictment as to the name of a person (§§ 6, 7, 275, 281, 293, 294, 295), are not viola-

- by the Constitution ; the imposition and collection of the tax, as provided in the act, is simply an incident in the settlement of the estate of a deceased person, and is not so foreign to the jurisdiction generally exercised by said courts as to make the act obnoxious to any constitutional objection. *Id.*
7. The fact that the act may not have operation as intended by the Legislature in some cases does not affect its validity in the cases where it may operate without difficulty or embarrassment. *Id.*
8. The provision of the act in relation to assignments for the benefit of creditors (§ 29, chap. 486, Laws of 1877, as amended by chap. 328, Laws of 1884), which provides that in all assignments made pursuant to the act, the wages or salaries due to employes shall be preferred before any other debt, is constitutional ; the Legislature may permit such an assignment to be made only on expressed conditions, and the assignor, by the act of making the assignment, accepts the conditions. *Richardson v. Thurber.* 606
3. A person can contract with a municipal corporation only through its authorized agents, and is chargeable with notice of the limitations upon their official authority imposed by general laws. *Lyddy v. L. I. City.* 218
4. D. conveyed certain premises to plaintiff by warranty deed, receiving a mortgage thereon for part of the purchase-money. There were at the time two mortgages on the premises, one owned by defendant. Plaintiff paid the amount of his mortgage before due to defendant, who then held it as collateral security for obligations of D., in consideration of an oral agreement on its part to release the premises from its mortgage and to procure a release of the other mortgage. It released its own, but did not procure a release of the other, which was subsequently foreclosed and the premises sold. In an action to recover damages for a breach of agreement, *held*, that it was not within the statute of frauds, as the undertaking of defendant was original, not collateral, nor was it a contract for the sale of lands or an interest therein ; also that the contract was not *ultra vires*. *McCrailh v. Nat. M. Val. Bank.* 414

CONTRACTS.

1. When the terms and language of a contract are ascertained, in the absence of technical phrases, or of terms, the meaning of which is obscure, or of latent ambiguities, rendering the subject-matter of the contract uncertain and doubtful, the office of interpreting its meaning belongs to the court. *Brady v. Cassidy.* 147
2. To render parol evidence competent, in case of a written contract, it is not enough that there were circumstances known to one of the parties which might have influenced him in making the contract which were not known to the other party ; to create an ambiguity that opens the contract to parol explanation, it must be established by proof of circumstances known to all of the parties. *Id.*
5. In an action to recover dower it appeared that plaintiff, during the lifetime of her husband, who had been declared a lunatic, and a committee of his estate appointed, entered into a contract with the committee and the children of her husband, and executed to them a deed, by which, in consideration of the receipt by her of about one-third of her husband's property, she released all interest in his estate, including "her inchoate right of dower (if any exists), of, in and to any and all real estate" of her husband, and also covenanted at any time, on demand, to execute all future necessary deeds, releases or transfers, to carry out the intention of the parties, "namely, the full and perfect release" of her "inchoate and other rights in the property" of her husband, which she had or might have at the time of the death ; and she also covenanted

not to make any claim therefor on the death of her husband. *Held*, that plaintiff was not entitled to dower; that there was under the agreement and within the meaning of the Revised Statutes (1 R. S. 741, §§ 12, 13, 14), a pecuniary provision made in lieu of dower; and, as plaintiff had retained that provision and never offered to return it, she must be deemed to have elected to keep it in lieu of dower. *Jones v. Fleming*. 418

6. Also *held*, that while the agreement and deed did not operate as a present release of her inchoate right of dower, as under the agreement, she received a separate estate, it was obligatory upon her, and she was bound to release her dower; that it was immaterial that defendants did not then own the land in which dower is claimed; that they were competent to make a contract for the benefit of the land when their interest should come into existence. *Id.*

7. While the delivery of personal property to the vendee under an executory contract of sale is an important and controlling fact on the question as to change of title, it is not conclusive; if the delivery is simply to meet some term of the contract not inconsistent with the retention of title by the vendor, it will not pass the title contrary to the intention. *Cornell v. Clark*. 451

8. So where anything remains to be done to ascertain and identify the subject of sale the title does not pass. *Id.*

9. A railroad corporation entered into a contract with M., by which the latter agreed to deliver to the former, at certain specified points on the company's lands, twenty thousand ties, at fifty-five cents each for first-class ties, and thirty-five cents "for what shall be adjudged second-class ties," to be inspected and counted by a person named. The company agreed to advance fifteen cents apiece for ties as they were delivered, "the remainder to be paid on or about the time the ties are taken and

used." M. delivered a quantity of ties, which were counted, and the company paid the advance agreed upon. The ties were never inspected or divided into classes. The company became insolvent, and its property and franchises were sold on foreclosure. In an action wherein the question was as to the title to the ties, *held*, that the title did not pass to the company by the delivery; that it was not bound to take all the ties, but only such as should be adjudged first and second-class, the inspector having power to reject unmerchantable ties, and so, it could not be known until inspection and separation were made what part of the ties were to be taken. *Id.*

10. H., defendant's intestate, executed to the executors of S. two written instruments, by each of which he promised to pay to them as such executors at his death, if he died without heirs, a sum specified, which the instrument described as a fund held by the executors in trust, in which H. had a life estate, with remainder over to his heirs. H. died leaving an heir. In an action to recover the sum specified, *held*, that, as the condition in the instrument, if carried out, would cause the fund to fall into the estate of H., subject to administration, it would result in an unlawful disposition of the money, and so it was illegal and void; that the money was repayable on the death of H., irrespective of the question whether he left heirs or not; and that plaintiff was entitled to recover. *Lee v. Horton*. 538

11. Plaintiff's complaint alleged his appointment as executor of the will of H., the execution to him by the K. C. C. R. R. Co. of a promissory note, a copy of which was set forth in the complaint, which was made payable to him or order, he being described as executor of H.; the transfer and delivery of the note to F., who held the same at the time of the making of an agreement between plaintiff and defendant; in pursuance of which agreement plaintiff transferred and assigned to defendant certain

stock and bonds of the company and claims against it. In consideration whereof defendant, by the said agreement, promised, among other things, that when his interest in the road and in the securities was closed up he would apply the proceeds, with the consent of the company, to the payment of the note, provided F. would relinquish certain bonds of the company. The complaint further alleged that said agreement was entered into by plaintiff individually, for the purpose of making certain provision for the payment of the note; that the note and the bonds referred to were thereafter assigned to him by F.; that when the note became due payment was demanded and refused, it was duly protested and notice of nonpayment served upon plaintiff; that the interest specified in the agreement had been closed up, and defendant had received on account of the property, over and above all advances and expenditures, a sum more than sufficient to pay said note; that the consent of the company to such payment had been obtained, and that a tender of the bonds was made, with demand of payment, but that defendant refused to pay. On demurrer to the complaint; *held*, that it set forth a good cause of action; that if plaintiff simply occupied the position of assignee from F., the promise of defendant became available to, and could have been enforced by F.; and by the transfer of the note to plaintiff he acquired that right; that even if this were not so, plaintiff, having become possessed of the note, could enforce the promise to pay it, not simply as assignee of F., but as a party to the agreement. *Litchfield v. Flint*. 543

12. Where goods were delivered under a contract by which the purchaser agreed to pay the "ruling market rates," and it appeared there were two market rates, one for goods of the kind bought of importers and another for them as sold by jobbers, *held*, it was competent to give in evidence the conversation of the

parties and the surrounding circumstances for the purpose of showing which of the two was intended by the parties. *Manchester Paper Co. v. Moore*. 680

See COVENANT.
GUARANTY.

CORPORATIONS.

1. Where it is sought to take the property of an individual under powers granted by statute to a corporation, to be formed in a particular manner therein directed, the constitutional protection of the rights of private property requires that the powers granted be strictly pursued, and all the prescribed conditions performed. *In re N. Y. Cable Co. v. Mayor, etc.* 1
2. *It seems* where the power is conferred upon a corporation duly formed, it will not be defeated simply because the corporation has done or omitted some act which may be a cause of forfeiture of its rights and franchises, as it rests with the State to determine whether such forfeiture will be enforced. *Id.*
3. While the courts may, by *mandamus*, act in certain cases affecting corporate matters, they can only do so where the duty concerned, and thus attempted to be enforced, is specific and plainly imposed upon the corporation. *People v. N. Y. L. E. & W. R. R. Co.* 58
4. Under the act of 1857 (Chap. 456, Laws of 1857), in reference to the assessment of taxes on corporations, the capital stock of a corporation, less the part thereof owned by the State or by literary or charitable institutions, or exempted from taxation by the Revised Statutes (1 R. S. 388, § 4), is to be assessed at its actual value, whether more or less than its nominal amount, deducting, however, therefrom the assessed value of its real estate and shares owned by it in other taxable corporations, and, also, from its sur-

plus or reserved fund, if any, an amount not exceeding ten per cent of its capital. *People ex rel. Panama R. R. Co. v. Com'r's Taxes*, 240

5. Where a corporation, liable to taxation under said act, has real estate in another State or country, the provision directing a deduction of the assessed value of such real estate requires that the deduction shall be measured by its actual value, and, in the absence of other and better evidence, the price paid for the real estate may be taken as representing such value. *Id.*

6. It is incumbent upon a corporation, before it is entitled to call upon the court to correct an assessment by increasing the sum to be deducted for the value of its real estate, to give evidence and furnish data, showing that the actual value exceeds the sum fixed by the assessors. It is not enough that the evidence raises a doubt or permits a conjecture that injustice may have been done. *Id.*

7. The franchise of a corporation is not, within the tax laws, to be reckoned as realty. (1 R. S. 987, §§ 1, 2.) *Id.*

8. *It seems* that corporate franchises are not, on general principles, to be considered as real property. *Id.*

9. The commissioners of taxes of the city and county of New York, in assessing the capital stock of relator, a domestic corporation, operating a railroad across the Isthmus of Panama under its charter and a grant of an exclusive right to construct and operate such a road, fixed the value of its real estate on the Isthmus at the amount paid out by it therefor, and in the construction of its road. The relator proved its net income for three years, including the one for which the assessment was made, and showed that the average income of those years capitalized, would produce a sum much larger than the value as so fixed by the commissioners. The relator claimed, that by deducting

from this sum the actual value of its personality, the residue represented the value of its real estate. *Held*, untenable; that the value of the franchises of the corporation was an important element in determining the value of its road as a whole, or of its capital stock; that as the income of the relator is derived not only from the use of the real and personal property, but, also, from its franchises, it is impossible to ascertain, from proof of the income alone, the value of either element entering into the aggregate value of the corporate property; and therefore the evidence afforded no legal basis upon which the court could change or reduce the assessment. *Id.*

See INSURANCE (LIFE).

MANUFACTURING CORPORATIONS.
MUNICIPAL CORPORATIONS.
RAILROAD CORPORATIONS.

COSTS.

1. The right of the court, under the Code of Civil Procedure (§ 1836), to allow costs to the plaintiff, in an action against executors or administrators upon a claim against the estate, where they have refused to pay the claim, or any part of it, is not affected by the fact that the amount claimed in the account presented was larger than the amount claimed in the complaint, or that the latter claim was larger than the recovery. *Carter v. Beckwith*. 236

2. Where it appears that, upon presentation of the claim, the defendants not only refused to pay, but also to refer it, to entitle plaintiff to costs, it is not essential to show that, after the refusal, he made an offer of reference before the commencement of the action. *Id.*

3. The words "with costs" in an order of affirmance or reversal in this court, in a case where the

allowance of costs is discretionary, mean costs in this court only. *In re Water Com're Amsterdam.* 677

— *When motion for retaxation of costs was granted, with directions to the clerk to pay in addition a trial fee and \$10 additional, because trial occupied more than twenty days, and the papers on which motion was made were not included in return, but instead a mere memorandum containing an extract from judgment and the costs as taxed, with stipulation of the attorneys that it was assented to "as and for papers on appeal," held, that nothing appeared to make the appellant's objection intelligible.*

See Orshull v. Mullin. 660

COUNTER-CLAIM.

The allowance as an equitable offset, to reduce a demand in suit of an item, which cannot be allowed as a legal offset or counter-claim, is only proper where the equity invoked is entirely clear and certain, where other remedies are impossible, and where the demand allowed is put beyond reasonable doubt. *Armstrong v. McKelvey.* 179

COUNTY OF KINGS.

— *Liability of towns of, for alleged injuries caused by defective highways.*

See Monk v. Town of N. U. 553

COURTS.

See COURT OF APPEALS.
COURT OF COMMON PLEAS (NEW YORK CITY.)
GENERAL TERM.
SURROGATE'S COURT.

COURT OF APPEALS.

1. This court has no jurisdiction to compel an appellant to attach to the return copies of documents which were not part of the record

in the court below. *States v. Cromwell.* 664

2. If the documents should for any reason be made part of the record a motion for that purpose should be made in the court below. *Id.*

COURT OF COMMON PLEAS (NEW YORK CITY.)

The necessity of an order of the Court of Common Pleas of the city of New York, allowing an appeal to this court as required by the Code of Civil Procedure (§ 190), was not dispensed with by the act of 1886 (chap. 418, Laws of 1886), in reference to appeals from judgments of the General Term of the City Court; as the main object, of the act, which is to dispense with appeals from such judgments to the Court of Common Pleas, has failed because unconstitutional, and as all the provisions are connected, being parts of a single scheme, the incidental provision must fail also. *Jones v. Jones.* 284

COVENANT.

1. A grantee, who by his deed has assumed and agreed to pay a mortgage on the premises, cannot while holding possession avoid the obligation of his covenant on the ground that the deed is invalid. *Gifford v. Father Matthew T. A. B. Soc.* 189
2. An executory covenant, supported only by a meritorious, as distinguished from a valuable or pecuniary consideration, cannot be enforced either at law or equity. *In re Wilbur v. Warren.* 192
3. One who purchases land, subject to a mortgage, makes the land thereby the primary fund for the payment of the mortgage debt, and this is so, although the deed contains a covenant on the part of the grantee to pay the mortgage debt. The covenant is to indemnify the grantor against the contingency

that the land may not bring enough to pay such debt. *Id.*

4. W. purchased certain real estate, subject to a mortgage thereon, which by his deed he assumed and agreed to pay. He conveyed the land to his daughter by deed containing full covenants, in which no reference was made to the mortgage. The only consideration for the deed was natural love and affection. W., after the conveyance, paid part of the mortgage. The daughter, after his death, paid interest on the balance and for the amount so paid presented a claim against his estate. *Held*, that the land was the primary fund for the payment of the mortgage, and the daughter took it subject to that burden; that the covenants in the deed were invalid and W. incurred no obligation, legal or equitable, to pay the mortgage in exoneration of the land; and that, therefore, the claim was improperly allowed. *Id.*

CREDITOR'S SUIT.

1. Where, in an action by judgment-creditors to set aside a conveyance by a husband through a third person to his wife, on the ground that the same was fraudulent as against creditors, it appeared that the conveyance was for a good consideration, and there was no proof of fraudulent intent or of facts from which fraudulent intent could be inferred. *Held*, that a refusal to nonsuit was error, although as against creditors the conveyance might have been converted into a mortgage; that such relief could only be given upon proper evidence in an action where it was consistent with the case made by the complaint and embraced within the issues. *Truesdell v. Sarlos*. 164
2. The fact that previous to such a conveyance credit has been given to the husband, and that the creditor was not informed of the conveyance when a subsequent credit was given is no evidence of fraudulent intent. *Id.*

CRIMINAL TRIAL.

1. Where an indictment under the Penal Code (§ 284) for seduction under promise of marriage, is defective in not giving the correct surname of the female, the court, on trial, has power to cure the defect by directing an amendment. *People v. Johnson*. 213
2. The provisions of the Code of Criminal Procedure, allowing such an amendment (§§ 6, 7, 275, 281, 293, 294, 295), are not violative of the provision of the State Constitution (art. 1, § 6), declaring that "no person shall be held to answer for a capital or otherwise infamous crime * * * unless upon presentment or indictment of a grand jury." *Id.*
3. An abstract opinion of the court in its charge on the trial of a criminal action, not based on any evidence in the case, even if technically erroneous, is no ground for reversal on appeal. (Code of Crim. Pro., § 542.) *Id.*
4. Upon the trial of an indictment for rape it is proper to prove by the complainant, after she has testified to the commission of the offense charged, a prior unsuccessful attempt upon her, by the defendant, to commit the same crime. *People v. O'Sullivan*. 481
5. The testimony of the complainant on such a trial was to the effect that the offense was committed upon her by defendant, a Catholic priest, in his house, where she was employed as a servant, on May 6, 1884; that she remained in his service until August twentieth thereafter without disclosing the facts in any manner to any one, although she had full and free communication with her friends. She left defendant's employ not on account of the offense, but because the defendant whipped her for some fault. She went home to her foster-parents and remained with them until September tenth, and then went to work in a situation procured for her, at her request, by defendant, and while living there on March 28,

- 1885, disclosed for the first time the offense, to a Catholic priest at confession. Testimony as to the disclosure was received under objection and exception. The only excuse for the delay in making the disclosure given by the complainant was that after the assault upon her she voluntarily went to the defendant's confessional, while living with him, on several occasions, and confessed to him, and on each occasion he asked her if she had told any one, and on her answering in the negative, he said "God bless you, my child." Also, that while she lived with him he told her it was a sin to "tell on a priest," and if she did, she would go to hell or purgatory; that she did not go to confessional afterward until the time when she made the disclosure. *Held*, that testimony as to the disclosure so long after the offense was improperly received. *Id.*
6. A disclosure in a case of rape has no value whatever, unless it is the natural result of the horror and sense of wrong which would prompt any virtuous female to make an outcry at the first suitable opportunity. *Id.*
7. Where, upon the trial of an indictment for murder, the admissibility of statements made by the deceased, which are offered in evidence as dying declarations, is brought in question, it is the duty of the court to determine, as a preliminary issue, whether the alleged declarations were made by the deceased under a conviction of approaching and imminent death. *People v. Smith.* 491
8. Such preliminary examination may, in the discretion of the court, be conducted in the presence of the jury; but during it they stand simply in the attitude of spectators; with the testimony given they have no concern, it being merely for the information of the court, and until by its ruling some portion of it is presented to the jury as competent evidence in the case, there is nothing to which the defendant may except as constituting legal error. (ANDREWS and PECKHAM, JJ., dissenting.) *Id.*
9. An exception, therefore, may not be based upon the reception in evidence upon such preliminary examination of statements of the deceased, not relating to the immediate circumstances of the death, which is not so presented to the jury. (ANDREWS and PECKHAM, JJ., dissenting.) *Id.*
10. It is within the discretion of the court to determine how far the examination shall extend. The exercise of that discretion is reviewable by the General Term, but not by this court; unless it appears that such discretion was abused, and the action of the court arbitrary and unreasonable. *Id.*
11. On the trial of an indictment for murder, where it was claimed by the prosecution that the defendant fled after the homicide, *held*, it was competent to prove the action of the officers in seeking for him to arrest him. *People v. Ogle.* 511
12. Upon such a trial after a witness for the defendant had testified that he (defendant) had been previously arrested on a charge of shooting a man, and honorably acquitted, the defendant was called as a witness in his own behalf, and on cross-examination, was asked if he had been arrested on the charge referred to by his witness, and an answer was received under objection and exception. *Held*, no error. *Id.*
13. Defendant's counsel asked the court to charge, in relation to facts necessary for the corroboration of an accomplice, "that they must be inconsistent with the innocence of the defendant, and which exclude every hypothesis but that of guilt." The court refused so to charge. *Held*, no error; that the rule only requires a corroboration as to some material fact which goes to prove the prisoner was connected with the crime. *Id.*
14. The court, after it had left the question of the credibility of witnesses, claimed to be accomplices,

to the jury, refused to charge that the jury would be justified in requiring every fact sworn to by said witnesses to be corroborated to its satisfaction, and if not so corroborated, to reject the fact as not proved. *Held*, no error. *Id.*

15. Where, upon the trial of an indictment for burglary, the "breaking," which is the essential element of that crime, was established by uncontradicted evidence. *Held*, that it was not error for the court to refuse to charge the jury that they might convict of misdemeanor, under the provision of the Penal Code (§ 505), declaring a person guilty of a misdemeanor who enters a building under circumstances, or in a manner not amounting to a burglary, for the purpose of committing a felony, larceny, or any malicious mischief. *People v. Meegan.* 529

16. Also *held*, such a refusal to charge was not error, where a modification of the indictment by striking out the characteristics of burglary would not have left an adequate description of the misdemeanor. *Id.*

17. The provision of the Code of Criminal Procedure (§ 399), requiring corroboration of the testimony of an accomplice is complied with, if there is some other evidence fairly tending to connect the defendant with the commission of the crime charged, so that the conviction will not rest entirely upon the evidence of the accomplice. The question as to whether the evidence is sufficient corroboration is for the determination of a jury. *People v. Everhardt.* 591

18. Upon the trial of an indictment for forgery; the charge being that defendant knowingly uttered a forged check. *Held*, that on the question of guilty knowledge it was competent to prove the uttering by him of other forged checks upon other occasions. *Id.*

19. The defendant was described in the indictment by various names. Upon the trial defendant's counsel

gave his true name, and requested that in administering oaths on the trial, the clerk should designate him by this name omitting the fictitious names. The court replied that it would instruct the clerk to designate defendant by the name so given, and would allow him to state the other names contained in the indictment, and in administering oaths, the clerk gave all the names, to which said counsel excepted. It appeared from the examination of some of the jurors, that they were prejudiced by the fact that he seemed to have so many different names; these were excluded from the jury. *Held*, that while the fictitious names might have been omitted after the true name was discovered, no material error was committed by the repetition of them. *Id.*

20. After the rendition of a verdict of guilty, at the request of defendant's counsel, the defendant was remanded until a day named for the purpose of a motion for arrest of judgment and for a new trial; no motion was made by either party on the day named or during the term. At the next term of the court, the same judge presiding, the district attorney moved for judgment, which was opposed on the ground that the court had no jurisdiction. *Held*, untenable; that it was fairly to be assumed that defendant, by not appearing, or offering to appear, on the day named, and by not objecting, waived the delay within the meaning of and as authorized by the provision of the Code of Criminal Procedure (§ 472), in reference to the time of pronouncing judgment after a verdict of guilty. *Id.*

21. An indictment charged, in substance, and the evidence justified a finding that defendant and others, with intent to extort money from the prosecutor, sent to him a letter, well knowing its contents, falsely accusing him of having had sexual intercourse with M., an unmarried female, resulting in pregnancy. The letter was set forth in the indictment it pur-

ported to have been written by one of the accused, an attorney, and was addressed to the prosecutor. It alleged that the writer had been informed by M. of the fact of such intercourse and its results, and after referring to the liability in such case for the support of the child and the mother's expenses during her sickness, concluded thus, "are you willing to make suitable provision for such liability and thereby avoid publicity, or will it be necessary to take legal steps in the matter." *Held*, that the indictment was good in substance, and the evidence justified a conviction. *People v. Wightman*. 598

DAMAGES.

D. conveyed certain premises to plaintiff by warranty deed, receiving a mortgage thereon for part of the purchase-money. There were at the time two mortgages on the premises, one owned by defendant. Plaintiff paid the amount of his mortgage before due to defendant, who then held it as collateral security for obligations of D., in consideration of an oral agreement on its part to release the premises from its mortgage, and to procure a release of the other mortgage. It released its own, but did not procure a release of the other, which was subsequently foreclosed and the premises sold. In an action to recover damages for a breach of the agreement, the court charged the rule of damages to be the value of the land at the time of the foreclosure sale, unless from the evidence it could be seen that the promised release could have been procured for a less sum; in which case that would be the measure of damages. *Held*, no error. *McCraith v. Nat. M. Val. Bk.* 414

DEED.

1. A grantee, who is in undisturbed possession and enjoyment of the premises conveyed to him, may not retain that possession and at

the same time withhold the purchase-price; and where by his deed he has assumed and agreed to pay a mortgage on the premises, he cannot while holding possession avoid the obligation of his covenant on the ground that the deed is invalid. *Gifford v. Father Matthew T. A. B. Soc.* 189

2. One who purchases land, subject to a mortgage, makes the land thereby the primary fund for the payment of the mortgage debt, and this is so, although the deed contains a covenant on the part of the grantee to pay the mortgage debt. The covenant is to indemnify the grantor against the contingency that the land may not bring enough to pay such debt. *In re Wilbur v. Warren*. 192

3. W. purchased certain real estate, subject to a mortgage thereon, which by his deed he assumed and agreed to pay. He conveyed the land to his daughter by deed containing full covenants, in which no reference was made to the mortgage. The only consideration for the deed was natural love and affection. W., after the conveyance, paid part of the mortgage. The daughter, after his death, paid interest on the balance and for the amount so paid presented a claim against his estate. *Held*, that the land was the primary fund for the payment of the mortgage, and the daughter took it subject to that burden; that the covenants in the deed were invalid and W. incurred no obligation, legal or equitable, to pay the mortgage in exoneration of the land; and that, therefore, the claim was improperly allowed. *Id.*

DEFENSES.

1. A grantee, who is in undisturbed possession and enjoyment of the premises conveyed to him, may not retain that possession and at the same time withhold the purchase-price; and where by his deed he has assumed and agreed to pay a mortgage on the premises, he cannot while holding posses-

sion avoid the obligation of his covenant on the ground that the deed is invalid. *Gifford v. Father Matthew T. A. B. Soc.* 189

2. No partial justification of the damages inflicted by an unlawful structure, and its unlawful use can be predicated upon the circumstance that under other conditions, and through a lawful exercise of authority, some of the consequences complained of might have been produced without rendering their perpetrator liable for damages (RUGER, Ch.J., ANDREWS and DANFORTH, JJ., concurring). *Lahr v. Met. El. R. R. Co.* 268

3. Where an action to recover damages for the alleged unlawful taking of timber cut from land of which plaintiff has not the actual possession, is based wholly upon a constructive possession arising out of his claim of title to the land, defendant may contest the validity of such title. *People v. Hagadorn.* 516

DEFINITIONS.

1. Where the plaintiff succeeds on trial in an action not founded on contract, the amount of the judgment as rendered, exclusive of costs is to be considered "the amount in controversy" in determining as to whether the judgment is reviewable here. *Graville v. N. Y. C., etc.* 674
2. The fact that the complaint asks judgment for less than \$500, or that in fixing damages interest is included as an item thereof, is not material. *Id.*
3. The words "with costs" in an order of affirmance or reversal in this court, in a case where the allowance of costs is discretionary, mean costs in this court only. *In re Water Com'rs Amsterdam.* 677

DEVISE.

See LEGACIES.
WILLS.

DEVISEES.

See LEGATEES, NEXT OF KIN, HEIRS AND DEVISEES.

DOWER.

1. The will of B., who died leaving both real and personal estate, after providing for the payment of his debts and giving certain specific legacies, gave his residuary estate to his executors to sell and dispose of the same and divide the proceeds equally between his "wife and children, share and share alike." *Held*, that the widow was not put to her election, but was entitled to dower in addition to the provision made for her in the will; that the devise to the executors was void as a trust, but valid as a power in trust, and the lands descended to the heirs, subject to the execution of the power; and that the execution of such power was not inconsistent with a dower interest, but a sale would be subject thereto. *Konvalinka v. Schlegel.* 125

2. Dower is never excluded by a provision for the wife except by express words or necessary implication. Where there are no express words there must be on the face of the will a demonstration of the intent of the testator that the widow shall not take both dower and the provision. Such demonstration is furnished only where there is a clear incompatibility, arising on, the face of the will, between a claim of dower and a claim to the benefit of the provision. *Id.*
3. The intention to put the widow to an election between dower and the provision may not be inferred from the extent of the provision or because she is devisee for life or in fee, or because it might seem to the court unjust as a family arrangement to permit her to claim both, or because it might be inferred that had the attention of the testator been called to it he would have expressly excluded dower. *Id.*

4. In an action to recover dower it appeared that plaintiff, during the

lifetime of her husband, who had been declared a lunatic, and a committee of his estate appointed, entered into a contract with the committee and the children of her husband, and executed to them a deed, by which, in consideration of the receipt by her of about one-third of her husband's property, she released all interest in his estate, including "her inchoate right of dower (if any exists), of, in and to any and all real estate," of her husband, and also covenanted at any future time on demand to execute all necessary deeds, releases or transfers, to carry out the intention of the parties, "namely, the full and perfect release" of her "inchoate and other rights in the property" of her husband, which she had or might have at the time of the death; and she also covenanted not to make any claim therefor on the death of her husband. *Held*, that plaintiff was not entitled to dower; that there was under the agreement and within the meaning of the Revised Statutes (1 R. S. 741, §§ 12, 13, 14), a pecuniary provision made in lieu of dower; and, as plaintiff had retained that provision and never offered to return it, she must be deemed to have elected to keep it in lieu of dower. *Jones v. Fleming*. 418

5. Also *held*, that while the agreement and deed did not operate as a present release of her inchoate right of dower, as under the agreement she received a separate estate, it was obligatory upon her, and she was bound to release her dower; that it was immaterial that defendants did not then own the land in which dower is claimed; that they were competent to make a contract for the benefit of the land when their interest should come into existence. *Id.*

EASEMENT.

1. Where the public have taken an easement for a street or highway, and the surface of the land is above the grade of the highway, so that, in order to reach the grade line, it

is necessary to remove the superincumbent material, this may be used on other portions of the road, on the premises of other land owners; but the public easement justifies only the taking of earth and soil which the process of construction or repair requires, and necessarily compels to be removed. *Robert v. Sadler*. 229

2. Abutters upon public streets in a city are entitled to such damages as they may have sustained by reason of a diversion of the street from the use for which it was originally taken, and its illegal appropriation to other and inconsistent uses. *Lahr v. Met. El. R. Co.* 268
3. An elevated railroad in a street of a city, supported by columns placed along the outer line of the sidewalks, and operated by steam power, is a perversion of the use of the street from the purposes originally designed, and is a use which neither the city authorities nor the legislature can legalize or sanction, without providing compensation for the injury inflicted upon property of abutting owners. *Id.*
4. Abutters upon a public street of a city, claiming title to their premises by grant from the municipal authorities, which grant contains a covenant that a street to be laid out in front of such property shall continue forever thereafter as a public street, acquire an easement in the bed of the street for ingress and egress to and from their premises, and, also, for the free and uninterrupted passage and circulation of light and air. *Id.*
5. The ownership of such an easement is an interest in real estate, constituting property within the meaning of that term as used in the Constitution of the State, and requires compensation to be made therefor before it can lawfully be taken for public use. *Id.*
6. The erection and operation of an elevated railroad as aforesaid in the street, the use of which is intended to be permanent, constitutes

a taking and appropriation of the easement by the railroad corporation rendering it liable to the abutters for the damages thereby occasioned. *Id.*

EMINENT DOMAIN.

1. Where it is sought to take the property of an individual under powers granted by statute to a corporation, to be formed in a particular manner therein directed, the constitutional protection of the rights of private property requires that the powers granted be strictly pursued, and all the prescribed conditions performed. *N. Y. Cable Co. v. Mayor, etc.* 1
2. *It seems* where the power is conferred upon a corporation duly formed, it will not be defeated simply because the corporation has done or omitted some act which may be a cause of forfeiture of its rights and franchises, as it rests with the State to determine whether such forfeiture will be enforced. *Id.*
3. In the case of public improvements, authorized by statute, which provides a mode of compensation to persons injured, that mode is exclusive and no right of action exists in their favor except that directed in the statute. *Heiser v. Mayor, etc.* 68
4. Where the public have taken an easement for a street or highway, and the surface of the land is above the grade of the highway, so that, in order to reach the grade line, it is necessary to remove the superincumbent material, this may be used on other portions of the road, on the premises of other land owners; but the public easement justifies only the taking of earth and soil which the process of construction or repair requires, and necessarily compels to be removed. *Robert v. Sadler.* 229
5. The smallness of the value of the fee in a highway does not justify a seizure of the fee without due

and lawful authority or its destruction by indirect rulings. *Id.*

6. An elevated railroad in a street of a city, supported by columns placed along the outer line of the sidewalks, and operated by steam power, is a perversion of the use of the street from the purposes originally designed, and is a use which neither the city authorities nor the legislature can legalize or sanction, without providing compensation for the injury inflicted upon property of abutting owners. *Lahr v. Met. El. R. R. Co.* 268
7. Abutters upon a public street of a city, claiming title to their premises by grant from the municipal authorities, which grant contains a covenant that a street to be laid out in front of such property shall continue forever thereafter as a public street, acquire an easement in the bed of the street for ingress and egress to and from their premises, and, also, for the free and uninterrupted passage and circulation of light and air. *Id.*
8. The ownership of such an easement is an interest in real estate, constituting property within the meaning of that term as used in the Constitution of the State, and requires compensation to be made therefor before it can lawfully be taken for public use. *Id.*

ESTOPPEL.

1. A judgment is not an estoppel as to any fact not expressly decided, and as to which contradictory inferences may be drawn, from different provisions in the judgment. *People ex rel. Bridgeman v. Hall.* 170
2. Where the State claimed title to lumber cut from land bid in at a tax sale, *held*, that proof of the comptroller's deed, having as against the State shown that it had once parted with its original property therein, and assumed to sell the land as that of a citizen for taxes, it was precluded from claiming that its original proprietorship still remained. *People v. Hagadorn.* 516

3. Where a vendor brought an action to recover the price of goods sold, and obtained an attachment therein; on the ground that the defendant had removed and disposed of his property with intent to defraud his creditors, which was levied on property of the defendant, but nothing was obtained by plaintiff under the attachment, and said action was subsequently discontinued, by order of the court, on notice to the defendant; *held*, that plaintiff was not precluded thereby from rescinding the sale, on the ground that it was induced by fraud on the part of the vendee, and from bringing an action to recover the goods sold, in the absence of proof that the vendor brought the first action with knowledge of the fraud. *Hays v. Midas*. 02
3. The plaintiff was asked and permitted to testify under objection and exception as to what services he rendered, excepting personal transactions or communications with the deceased. *Held*, that the question was proper in form, and if any improper evidence was given under it, it was defendant's duty to object and move to strike out so much of the answer as exceeded the legitimate scope of inquiry. *Id.*
4. A transcript, certified to by the proper officer, of a power of attorney authorizing the conveyance of land, recorded in the clerk's office of county in which the land is situated, is competent as evidence (1 R. S. 763, § 39; Code of Civ. Pro., § 938). *Id.*

EVIDENCE

1. To render parol evidence competent, in case of a written contract, it is not enough that there were circumstances known to one of the parties which might have influenced him in making the contract which were not known to the other party; to create an ambiguity that opens the contract to parol explanation, it must be established by proof of circumstances known to all of the parties. *Brady v. Casady*. 147
2. In an action to recover for services alleged to have been rendered to defendant's testator, after proof of the rendition of the services, plaintiff, as a witness in his own behalf, was asked if he had been paid therefor, this was objected to as involving a personal transaction with the deceased. The objection was overruled and plaintiff answered "No." Defendants offered no evidence tending to show payment. *Held*, that while the objection was good the evidence was wholly immaterial and could have done no harm, as payment was an affirmative defense, and the burden of proving it was upon the defendant. *Lerche v. Brasher*. 157
5. Where the statutory prohibition (Code of Civ. Pro., § 884) against the disclosure by a physician of information acquired by him while attending a patient in his professional capacity, has been expressly waived by the patient, and the waiver acted upon, it cannot be recalled; the information is then open to the consideration of the entire public, and the patient is not privileged to forbid its repetition. *McKinney v. Gd. St., etc., R. R. Co.* 353
6. Accordingly, *held*, where upon the trial of an action against a railroad corporation, to recover damages for injuries to plaintiff caused by negligence, a physician, who, as such, attended upon the plaintiff after the injury, was called as a witness in her behalf, and testified as to all the facts bearing upon her physical condition, learned by him while so attending upon her, that upon a subsequent trial the defendant was entitled to call and examine him as a witness in regard to such facts. *Id.*
7. Upon the trial of an indictment for rape it is proper to prove by the complainant, after she has testified to the commission of the offense charged, a prior unsuccessful attempt upon her, by the de-

fendant, to commit the same crime.
People v. O'Sullivan. 481

approaching and imminent death.
People v. Smith. 481

8. The testimony of the complainant on such a trial was to the effect that the offense was committed upon her by defendant, a Catholic priest, in his house, where she was employed as a servant, on May 6, 1884, that she remained in his service until August twentieth thereafter without disclosing the facts in any manner to any one, although she had full and free communication with her friends. She left defendant's employ not on account of the offense, but because the defendant whipped her for some fault. She went home to her foster-parents and remained with them until September tenth, and then went to work in a situation procured for her, at her request, by defendant, and while living there on March 28, 1885, disclosed for the first time the offense, to a Catholic priest at confession. Testimony as to the disclosure was received under objection and exception. The only excuse for the delay in making the disclosure given by the complainant was that after the assault upon her she voluntarily went to the defendant's confessional, while living with him, on several occasions, and confessed to him, and on each occasion he asked her if she had told any one, and on her answering in the negative, he said, "God bless you, my child." Also, that while she lived with him he told her her it was a sin to "tell on a priest," and if she did, she would go to hell or purgatory; that she did not go to confessional afterward until the time when she made the disclosure. *Held*, that testimony as to the disclosure so long after the offense was improperly received. *Id.*
9. Where, upon the trial of an indictment for murder, the admissibility of statements made by the deceased, which are offered in evidence as dying declarations, is brought in question, it is the duty of the court to determine, as a preliminary issue, whether the alleged declarations were made by the deceased under a conviction of
10. Such preliminary examination may, in the discretion of the court, be conducted in the presence of the jury; but during it they stand simply in the attitude of spectators; with the testimony given they have no concern, it being merely for the information of the court, and until by its ruling some portion of it is presented to the jury as competent evidence in the case, there is nothing to which the defendant may except as constituting legal error. (ANDREWS and PECKHAM, JJ., dissenting.) *Id.*
11. An exception, therefore, may not be based upon the reception in evidence upon such preliminary examination of statements of the deceased, not relating to the immediate circumstances of the death, which is not so presented to the jury. (ANDREWS and PECKHAM, JJ., dissenting.) *Id.*
12. In an action by executors or administrators against the maker of a note or the drawer of a check, executed for defendant by his agent, where the defense is payment, the agent is not precluded from testifying on behalf of his principal to personal transactions and communications with the decedent showing payment by the agent; he is not "interested in the event" within the meaning of the Code of Civil Procedure (§ 820). *Nearpass v. Gilman.* 506
13. In such an action the indorser of the paper, not a party, is also a competent witness for the defendant as to such transactions or communications, where it does not appear that he has been charged as indorser; his indorsement simply does not make him even presumptively liable, and, until presentation, protest and notice is shown, he does not stand in the attitude of one interested in the event. *Id.*
14. On the trial of an indictment for murder, where it was claimed by the prosecution that the defendant fled after the homicide, *held*,

- it was competent to prove the action of the officers in seeking for him to arrest him. *People v. Ogle*. 511
15. Upon such a trial after a witness for the defendant had testified that he (defendant) had been previously arrested on a charge of shooting a man, and honorably acquitted, the defendant was called as a witness in his own behalf, and, on cross-examination, was asked if he had been arrested on the charge referred to by his witness, and an answer was received under objection and exception. *Held*, no error. *Id.*
16. The provision of the Code of Criminal Procedure (§ 899), requiring corroboration of the testimony of an accomplice is complied with, if there is some other evidence fairly tending to connect the defendant with the commission of the crime charged, so that the conviction will not rest entirely upon the evidence of the accomplice. The question as to whether the evidence is sufficient corroboration is for the determination of a jury. *People v. Everhardt*. 591
17. Upon the trial of an indictment for forgery; the charge being that defendant knowingly uttered a forged check. *Held*, that on the question of guilty knowledge it was competent to prove the uttering by him of other forged checks upon other occasions. *Id.*
18. Upon the trial of an action to recover damages for injuries sustained by plaintiff in falling upon one of defendant's sidewalks, upon which snow and ice had fallen from an adjoining building, plaintiff offered in evidence an ordinance of the village, which imposed penalties upon persons who should throw snow or ice from roofs upon sidewalks, or who should neglect to keep sidewalks in front of their lots and buildings clear of snow and ice, this was received under objection and exception. *Held*, no error. *Pomfrey v. Vil. Saratoga Springs*. 459
19. A witness called for the plaintiff, after she had testified as to the condition of the sidewalk, and that a person had to be very careful, or fall, as she knew from experience, was permitted to testify, under objection, that she fell down in the same place. *Held*, no error. *Id.*
20. Indorsements of payments upon a note, made by the holder at a time when it was against his interest to make them, are *prima facie* evidence of the payments. *In re Kellogg*. 648
21. *It seems* on trial of an action against a railroad corporation for injuries to a child *non sui juris*, evidence that the parents were unable to hire any servant or person to aid the mother in looking after the child, is not competent to rebut proof of negligence on her part. *Cumming v. B. C. etc., R. R. Co.* 689
22. In such an action, *held*, that a municipal ordinance, prohibiting railroad companies from stopping its cars at a street intersection, so that they will interfere with travel on the cross streets, was properly received in evidence on the question of defendant's negligence, in connection with evidence that a train had stopped in violation of this ordinance, which prevented the plaintiff from seeing the approaching train. *Id.*
23. Where goods were delivered under a contract by which the purchaser agreed to pay the "ruling market rates," and it appeared there were two market rates, one for goods of the kind bought of importers and another for them as sold by jobbers, *held*, it was competent to give in evidence the conversation of the parties and the surrounding circumstances for the purpose of showing which of the two was intended by the parties. *Manchester Paper Co. v. Moore*. 680

EXCEPTIONS.

1. An exception to an erroneous ruling of a surrogate on the trial by him of an issue of fact is not a

ground for reversal, where it does not appear that the exceptant was necessarily prejudiced thereby. (Code of Civ. Pro. § 2545.) *In re Morgan*. 74

2. An appeal to this court from an affirmance by the General Term of a surrogate's decree, upon trial of an issue of fact, brings nothing here for review not presented by appeal to the General Term, and, upon appeal to the General Term, no finding or decision can be reviewed that was not excepted to. (Code of Civ. Pro. § 2545.) *In re Kellogg*. 648

EXCISE.

The office of commissioners of excise, is within the purview of the act "to center responsibility in the municipal government of the city of New York" (Chap. 43, Laws of 1884); and where an appointment to that office was made by the mayor after said act went into effect (January 1, 1885) *Held*, that a confirmation by the common council was not required to entitle the appointee to the office. *People ex rel. Haughton v. Andrews*. 570

EXECUTORS AND ADMINISTRATORS.

1. Although under a will it is possible for an executor to exchange the character for that of trustee, until he is discharged as executor by decree of the surrogate and directed to hold the remaining assets as trustee, or at least until there has been a payment to him as trustee, a new account opened and kept in the new capacity and a division of the fund, allotting to different beneficiaries their specific proportions, he remains as executor only, and is removable as such for misconduct. After such removal, upon petition of his successor, the Surrogate's Court has jurisdiction to compel him to account for and deliver over to his successor the assets in

his hands. (Code of Civ. Pro. §§ 2724, 2805.) *In re Hood*. 108

2. The doctrine of merger does not apply in such case, as in equity merger will never be allowed against the interest of the parties or their obvious intention, or where the two estates are held in different rights. *In re Gilbert*. 200
8. T. applied to G. and two others for a loan to a corporation. This they refused, but an agreement was made, under which they loaned the money to T., taking his notes therefor. T. loaned the money to the corporation taking its notes therefor, corresponding in the times of payments and amounts with those given by T. which were secured by mortgage on real estate of the corporation; these were assigned by T. as security for the loan. G. died and T. was appointed one of his administrators. He subsequently received another mortgage from the corporation on other lands, which he also assigned as collateral for the loan. This last mortgage was foreclosed by advertisement by the two surviving assignees and the administrators of G. The premises were bid off by the administrators, who, however, paid no money on the purchase. The interest of G. in the notes given by T. was set forth as assets in the inventory of his estate, and on final settlement of the accounts of the administrators, it appeared that such interest had been paid in full by T. and the accounts were so settled. Subsequently, the administrators joined in a deed of the said premises to a son of T., who conveyed the same to his father. In proceedings to compel T. to account, as administrator, for the proceeds received by him on sale of said lands, *held*, that on payment of the debt to the estate, T. was entitled to the land; that the fact that, as administrator, he was party to the foreclosure did not affect his equities; and that, therefore, he could not be compelled to account for such proceeds. *Id.*

4. It was claimed that by the agreement of the parties the estate was entitled to a greater rate of interest than was called for by the notes, or was accounted for by the administrator. *Held*, that such a claim could not survive the settlement of his accounts, as it should then have been asserted. *Id.*
5. The right of the court, under the Code of Civil Procedure (§ 1836), to allow costs to the plaintiff, in an action against executors or administrators upon a claim against the estate, where they have refused to pay the claim, or any part of it, is not affected by the fact that the amount claimed in the account presented was larger than the amount claimed in the complaint, or that the latter claim was larger than the recovery. *Carter v. Beckwith.* 236
6. Where it appears that, upon presentation of the claim, the defendants not only refused to pay, but also to refer it, to entitle plaintiff to costs, it is not essential to show that, after the refusal, he made an offer of reference before the commencement of the action. *Id.*
7. H., defendant's intestate, executed to the executors of S. two written instruments, by each of which he promised to pay to them as such executors at his death, if he died without heirs, a sum specified, which the instrument described as a fund held by the executors in trust, in which H. had a life estate, with remainder over to his heirs. H. died leaving an heir. In an action to recover the sum specified, *held*, that, as the condition in the instrument, if carried out, would cause the fund to fall into the estate of H., subject to administration, it would result in an unlawful disposition of the money, and so it was illegal and void; that the money was repayable on the death of H., irrespective of the question whether he left heirs or not; and that plaintiff was entitled to recover. *Lee v. Horton.* 538
8. The will of M. gave to his executors certain portions of his estate in trust "to receive the rents, interest and income," and to apply the net amounts thereof to the use of the testator's widow during her life, remainder to beneficiaries named. The testator died during the night of April 20, 1881. The trust fund included certain shares of stock of the P. R. R. Co. On April 14, 1881, a dividend of \$25,000 was declared on this stock, "payable May 2, 1881." On final accounting the executors charged themselves with this sum, treating the dividend as principal. *Held*, no error; that as soon as the dividend was declared the owner of the shares was entitled to it, and it became part of his estate; that the fact it was made payable at a future time was immaterial, that the dividends to which the life tenant was entitled as income were only those declared after the testator's death. *In re Kernochan.* 618
9. On the same principle, *held*, that the widow was entitled to the whole of an extra dividend, declared after such death, although made from net earnings accumulated before that time; that, whenever earned, they were not profits until so declared. *Id.*
10. Prior to the death of the testator the P. R. R. Co. had accumulated a fund from earnings which was set aside as a sinking fund to pay outstanding obligations. Certain of the stockholders, including the executors, entered into an agreement with another company for a sale of their stock to the company at \$250 per share, the company to have the sinking fund, and to pay said shareholders a ratable portion thereof, which was equivalent to \$15.74 per share. In the account this was included as part of the price received and credited as principal. *Held*, no error; as it was received, not as a dividend, but as part of the price for which the stock was sold, and so belonged to the remaindermen. *Id.*
11. The executors classed as income the value of certain options or privileges given to stockholders by various companies to subscribe for

- and take at par certain stocks and bonds. *Held*, error; that as the right accrued only on condition the estate chose to purchase or pay for the bonds or stocks, if the options were accepted the purchases operated to increase the capital or change its manner of investment, and so the value of the options did not belong to the life tenant. *Id.*
12. The testator had in his hands for investment and reinvestment certain moneys belonging to his wife, which he mingled with his own funds. *Held* (EARL, J., dissenting), that the estate was properly charged with compound interest thereon. *Id.*
13. By the will Mrs. M. was appointed executrix; she duly qualified and acted as such. The will contained a direction that each executor and trustee, other than his wife, "do receive and take the full rate of commissions provided by law for each executor," substantially the whole income of the estate was given to her. *Held*, that she was not entitled to commissions as it was the intention of the testator to exclude her from compensation. *Id.*
14. Prior and up to the death of a testator, K., his executor was his general agent. As such he placed in the hands of an attorney a claim for collection. The attorney was directed by the testator to pay the proceeds to K., this he did by sending a check for the avails of collection to the office of K., payable to his order. The testator died on the same day, after the delivery of the check. Two days thereafter K. drew the money on the check and credited it in his account with the testator, which prior to the credit showed a balance due K. The testator died insolvent. *Held*, that the surrogate properly allowed the credits; that when the check was delivered K. could treat it as funds in his hands to be applied, so far as needed, in payment of what the testator then owed him, and when the money was drawn upon the check the payment related

back to the delivery of the check, and he drew it as payee, not as executor. *In re Kellogg*. 648

15. Upon settlement of the accounts of an executor the surrogate improperly charged him with an item of \$11,000 and credited him with the amount of a claim against the estate which he had paid in full. The General Term, on appeal, struck out the erroneous charge, and as this left the estate insolvent, readjusted the account by disallowing the over payment. *Held*, that the General Term had the right to so modify the decree instead of sending it back for a rehearing before the surrogate. (Code of Civ. Pro. § 2587.) *Id.*

EXTORTION.

1. To sustain a conviction under the Penal Code (§ 558), for sending a threatening letter, it is not essential that the threat on its face be to do an illegal act. An accusation in writing of an act involving moral turpitude, known by the writer to be false, accompanied with a suggestion that legal proceedings will be taken, unless the person against whom it is made purchase silence, may be a threat within the statute, although, in form, the accused is only called upon to render satisfaction for that which, if the charge was true, would entitle the accuser to pecuniary compensation. *People v. Wightman*. 598
2. An indictment charged, in substance, and the evidence justified a finding that defendant and others, with intent to extort money from the prosecutor, sent to him a letter, well knowing its contents, falsely accusing him of having had sexual intercourse with M., an unmarried female, resulting in pregnancy. The letter was set forth in the indictment; it purported to have been written by one of the accused, an attorney, and was addressed to the prosecutor. It alleged that the writer had been informed by M. of the fact of such intercourse and its results, and

after referring to the liability in such case for the support of the child and the mother's expenses during her sickness, concluded thus, "are you willing to make suitable provision for such liability and thereby avoid publicity, or will it be necessary to take legal steps in the matter." *Held*, that the indictment was good in substance, and the evidence justified a conviction. *Id.*

FINDINGS OF LAW AND FACT.

The failure of a surrogate to make findings of fact and law as required by the Code of Civil Procedure (§ 2545), upon the trial of an issue of fact before him, is not a ground of objection to his decision on appeal. It is the duty of the party appealing to procure to be made such findings or refusals as will present, through appropriate exceptions, the question he desires to argue; if he omits to do this, no question is presented for review. *In re Hood*.

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FORECLOSURE.

1. By the judgment in an action for the foreclosure of a mortgage upon premises in the city of New York owned by G., plaintiff's intestate, the referee appointed to sell was directed to pay all assessments on the mortgaged premises out of the proceeds of sale. At the time of the sale there was an assessment on the premises for a local improvement, which the referee paid. This assessment was, on the application of G., subsequently vacated. In an action brought to recover back the amount paid, *held*, that although the assessment was paid without the knowledge of G., yet as it was paid by order of the court, out of moneys belonging to him, and the court had power to direct the payment so long as the assessment was not vacated, and as its validity could not be determined in the foreclosure suit, the payment was equivalent to a collection from G. under process of law, and he

was entitled to recover; also that it was not necessary, as a condition of recovery, to have the foreclosure judgment set aside or annulled, it was not the adjudication which created the apparent lien, or the authority upon which the right of the city, as between it and the property owner, to collect the assessment lepended. *Brehm v Mayor, etc.* 186

2. T. applied to G. and two others for a loan to a corporation. This they refused, but an agreement was made, under which they loaned the money to T., taking his notes therefor. T. loaned the money to the corporation, taking its notes therefor, corresponding in the times of payments and amounts with those given by T. which were secured by mortgage on real estate of the corporation, these were assigned by T. as security for the loan. G. died and T. was appointed one of his administrators. He subsequently received another mortgage from the corporation on other lands, which he also assigned as collateral for the loan. This last mortgage was foreclosed by advertisement by the two surviving assignees and the administrators of G. The premises were bid off by the administrators, who, however, paid no money on the purchase. The interest of G. in the notes given by T. was set forth as assets in the inventory of his estate, and on final settlement of the accounts of the administrators, it appeared that such interest had been paid in full by T. and the accounts were so settled. Subsequently the administrators joined in a deed of the said premises to a son of T., who conveyed the same to his father. In proceedings to compel T. to account, as administrator, for the proceeds received by him on sale of said lands, *held*, that on payment of the debt to the estate, T. was entitled to the land; that the fact that, as administrator, he was party to the foreclosure did not affect his equities; and that, therefore, he could not be compelled to account for such proceeds. *In re Gilbert*. 200

See MORTGAGE.

FOREIGN CORPORATIONS.

Defendant, a corporation created under the laws of, and doing business in another State, sold to plaintiffs, who were doing business in this State, certain agricultural implements, with an agreement to indemnify and defend them from all prosecutions because of any alleged infringement of any patent in selling the implements, provided notice was given to it, and it was allowed to take charge of the case. An action having been so commenced against plaintiffs they notified defendant and required it to take charge of the defense; this it did not do, and judgment was rendered against plaintiffs in that action. The summons in an action upon the guaranty was served in this State upon a director of the defendant. On motion to set aside the service, *held*, that the cause of action arose in this State and the summons was properly served (Code of Civ. Proc., § 482, subd. 8); also *held*, that for the purposes of the motion the records of defendant showing the election of the person upon whom service was made as a director, were sufficient to establish that he was one in fact. *Childs v. Harris Mfg. Co.*

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FORGERY.

Upon the trial of an indictment for forgery; the charge being that defendant knowingly uttered a false check. *Held*, that on the question of guilty knowledge it was competent to prove the uttering by him of other forged checks upon other occasions. *People v. Everhardt.*

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FORMER ADJUDICATION.

1. A judgment is not an estoppel as to any fact not expressly decided, and as to which contradictory inferences may be drawn, from different provisions in the judgment. *People ex rel. Bridgeman v. Hall.*

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2. At the annual town meeting in the town of Gravesend in 1871, a resolution was adopted, to the effect that the common lands of the town should thereafter be let on notice at public auction to the highest bidder, and if any lot is let to any person other than the last lessee, the new lessee shall pay the former one "the value of improvements on the property at the expiration of the old lease," which condition shall be specified in the notice of letting. A lease of the land in question was duly executed to plaintiffs, which expired February 1, 1883. The only provision contained therein as to payment for improvements was one substantially as contained in the resolution. The land was not relet. In an action to restrain a sale of the lot to a third person, it appeared that, after the expiration of plaintiffs' lease, the town brought an action of ejectment against them, wherein judgment was rendered in favor of the town. *Held*, that said judgment was conclusive against any claim on the part of plaintiffs to any right of possession in the land in question antedating its rendition, either to compel satisfaction by the town of their claim for improvements or for any other purpose. *Furey v. Tn of Gravesend.*

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— When claim against executor does not survive the final settlement of his accounts. *In re Gilbert.*

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FRAUD.

Where a vendor brought an action to recover the price of goods sold, and obtained an attachment therein, on the ground that the defendant had removed and disposed of his property with intent to defraud his creditors, which was levied on property of the defendant, but nothing was obtained by plaintiff under the attachment, and said action was subsequently discontinued, by order of the court, on notice to the defendant, *held*, that plaintiff was not precluded thereby from rescinding the sale, on the ground that it was induced by

fraud on the part of the vendee, and from bringing an action to recover the goods sold, in the absence of proof that the vendor brought the first action with knowledge of the fraud. *Hays v. Midas.* 602

FRAUDULENT CONVEYANCE.

1. Where, in an action by judgment-creditors to set aside a conveyance by a husband through a third person to his wife, on the ground that the same was fraudulent as against creditors; it appeared that the conveyance was for a good consideration, and there was proof of no fraudulent intent or of facts from which fraudulent intent could be inferred. *Held*, that a refusal to non suit was error, although as against creditors the conveyance might have been converted into a mortgage; that such relief could only be given upon proper evidence in an action where it was consistent with the case made by the complaint and embraced within the issues. *Truesdell v. Sarles.* 164
2. The fact that previous to such a conveyance credit has been given to the husband, and that the creditor was not informed of the conveyance when a subsequent credit was given is no evidence of fraudulent intent. *Id.*
3. An agreement, made at the time of the purchase of goods on credit, between the vendor and purchaser, that in case of the insolvency of the latter, or of an assignment becoming necessary, he will protect the former by a preference to the amount of the goods sold and unpaid for, is not in law a fraud upon other creditors, nor is it so far conclusive evidence of fraud as to avoid a preferential assignment made in pursuance thereof. *Nat. Park Bk. v. Whitmore.* 297
4. The affidavits upon which an attachment was issued set forth the making of such an agreement by the defendants with W., another creditor. The following facts also

appeared on motion to vacate the attachment. A few days before the assignment was made defendants reported that they were entirely solvent and could pay all their debts in full, and made a statement of their affairs showing a large surplus of assets over liabilities, soon after this claiming they could not pay their debts in full and were insolvent, they proposed to their creditors a compromise, and threatened, unless their offer was accepted, to make an assignment preferring W., stating that then the other creditors would get little or nothing. The assignment was made to a foreign assignee two days after the attachment was issued. The evidence tended to show that the assignors had been engaged in a prosperous business, and they gave no satisfactory or intelligible explanation of their sudden alleged insolvency. After the assignment was made defendants and the assignee co-operated apparently to coerce a compromise, and offered to "fix it up" with a creditor if he would consent thereto. *Held*, the facts justified a finding that the assignment was threatened and made by defendants, while not actually insolvent, to coerce a favorable compromise and thus secure a benefit to themselves; at least there was sufficient to give the court below jurisdiction to award the attachment, and its exercise was not reviewable here. *Id.*

5. An assignment for the benefit of creditors contained a provision that, "should it be necessary and to the better performance of the trust," the assignee shall have power "to finish such work as is unfinished," paying the necessary charges and expenses before paying the debts and liabilities as provided for in the assignment. In an action to set aside the assignment as fraudulent, *held*, that no power to determine as to the necessity was vested in the assignee by the instrument; but that the power conferred was conditioned upon a necessity to be determined by the court; that the assignee could not safely exercise

it except under order of the court, and in case he attempted so to do might be restrained at any moment and that, therefore, the provision did not vitiate the assignment *Robbins v. Butcher*. 575

GENERAL TERM.

An appeal to this court from an affirmance by the General Term of a surrogate's decree, upon trial of an issue of fact, brings nothing here for review not presented by appeal to the General Term, and, upon appeal to the General Term, no finding or decision can be reviewed that was not excepted to. (Code of Civ. Pro., § 2545.) *In re Kellogg*. 648

GIFT.

1. A gift by a father to a child entitled to share in the estate of the donor will not be held to be an advancement within the meaning of the provision of the statute of descents (1 R. S. 754, § 23) in relation to advancements to a child of an intestate, where it expressly appears to have been the intention of the father that the gift should not be considered as an advancement. *In re Morgan*. 74
2. A gift made by the intestate to his wife is not affected by said provision; such a set-off is only allowed as against children. *Id.*

GRANTOR AND GRANTEE.

A grantee, who is in undisturbed possession and enjoyment of the premises conveyed to him, may not retain that possession and at the same time withhold the purchase-price; and where by his deed he has assumed and agreed to pay a mortgage on the premises he cannot while holding possession avoid the obligation of his covenant on the ground that the deed is invalid *Gifford v. Father Matthew T' A. B. Soc.* 139

GRAVESEND (TOWN OF).

- 1 In 1871 the electors of the town of Gravesend passed a resolution, to the effect that the common lands of the town on Coney Island should thereafter be let only by auction to the highest bidder, and prohibited the letting of any lot at a time more than one year prior to the expiration of any existing lease. The same restriction was contained in a resolution passed in 1860, before the system of public lettings was adopted. In 1878 a resolution was adopted, amending that of 1871, by adding a provision authorizing the commissioners to renew any existing lease upon terms they may deem most advantageous to the town. *Held*, that this did not authorize the commissioners to renew leases without restriction as to the time when the power should be exercised; but, that it was subject to the restriction contained in the resolution of 1871; and that a renewal lease, executed more than a year prior to the expiration of an existing lease of the lot, was void. *Tillyou v Town of Gravesend*. 356
2. By the act of 1883 (Chap. 458, Laws of 1883), in reference to "the common lands of the town of Gravesend," the care, management and control of said lands are vested in the supervisors of the town, and the trustees chosen as specified therein, and it is provided, that they "shall not have power to sell or give title to any lands of the town," with certain exceptions. As to the lands excepted they are authorized to sell "to the present lessees in possession of the same," provided the sale be confirmed by resolution at the annual town meeting. In an action by former lessees of one of the excepted lots, whose lease had expired, to restrain a sale of the lot to a third person, *held*, that the act operated as a mere license and authority to the board so constituted to sell, in their discretion, to the lessees, but did not obligate them to do so; that a lessee acquired no legal or equitable interest in the land by virtue of its provisions until a contract

of sale had been perfected between him and the board, or unless he could show a case entitling him to the exercise of such discretionary power. *Purey v. Town of Gravesend.* 405

8. At the annual town meeting in said town, in 1871, a resolution was adopted, to the effect that the common lands of the town should thereafter be let on notice at public auction to the highest bidder, and if any lot is let to any person other than the last lessee, the new lessee shall pay the former one "the value of improvements on the property at the expiration of the old lease," which condition shall be specified in the notice of letting. A lease of the land in question was duly executed to plaintiff's, which expired February 1, 1883. The only provision contained therein as to payment for improvements was one substantially as contained in the resolution. The land was not relet. *Held*, that no liability was imposed upon the town by the resolution or the lease, to pay for plaintiffs' improvements, or to lease the land again, and no absolute liability in reference thereto, except that of specifying the new lessee's liability in the notice to be given for leasing, in case it was determined to lease again, which specification could not be construed as anything more than a covenant that the town would take measures to cause the new tenant to pay for the improvements; that, as there had been no new lease, no breach had occurred; the town was entirely at liberty to refuse to lease again, and to dispose of the lands otherwise according to its discretion. *Id.*

4. After the expiration of plaintiffs' lease the town brought an action of ejectment against them, wherein judgment was rendered in favor of the town. *Held*, that said judgment was conclusive against any claim on the part of plaintiffs to any right of possession in the land in question antedating its rendition, either to compel satisfaction by the town of their claim

for improvements or for any other purpose. *Id.*

5. Accordingly *held*, that even if said statute created an absolute prohibition upon the board from selling and conveying the land, as plaintiffs had no interest, and were not residents of the town, they could not enforce such prohibition. *Id.*

GUARANTY.

1. While the liability of a guarantor is *strictissimi juris*, and cannot be extended beyond the plain and explicit language of his contract, yet such contract is subject to the same rules of construction as other contracts; it is to be enforced according to the meaning and intent, and in the manner designed by the parties at the time of its execution. Effect must be given to all of the language of the contract, and a meaning and effect ascribed to each word and phrase used therein, if it can be done without violating the plain intent. *People v. Lee.* 441

2. Where it clearly appears by a guaranty that it was intended to embrace past as well as future transactions, such an effect will be given to it. *Id.*

3. A bank had been for a series of years annually appointed a depository of the State for canal tolls, and had annually executed and delivered to the State, a contract, guaranteed by some of its directors in their individual character. Each guaranty recited the designation of the bank, and its contract to receive and account for the tolls, and the guarantors covenanted jointly and severally that the bank would faithfully perform its contract, account for and pay over all moneys deposited with it, and also "account for and pay over all moneys now on deposit in said bank, or due or to become due therefrom to the people." In an action upon a guaranty so given, *held*, the guarantors were bound for the continuing security

of the deposit existing at the time; and so, they were liable for the whole balance due from the bank to the State at the beginning of the year, as well as for subsequent deposits. *Id.*

4. Also, *held*, that it was not competent for defendants to allege ignorance of the existence, at the time of the execution of the guaranty, of a debt so expressly provided for, or that they had been misled by an omission of their principal to notify them of its existence. *Id.*

5. It was claimed by defendants that they were released by the acceptance of a new contract and guaranty for the next year. No evidence of actual approval or acceptance was given. It appeared that a few days after the receipt, by the auditor of the new guaranty, during which time he was diligently engaged in inquiring into the responsibility of the persons proposed as sureties, and had received no satisfactory information, the bank failed. *Held*, that under the circumstances no acceptance could properly be inferred; and that a finding that there was no acceptance was justified. *Id.*

6. Defendant, a corporation created under the laws of and doing business in another State, sold to plaintiffs, who were doing business in this State, certain agricultural implements, with an agreement to indemnify and defend them from all prosecutions because of any alleged infringement of any patent in selling the implements, provided notice was given to it, and it was allowed to take charge of the case. An action having been so commenced against plaintiffs they notified defendant and required it to take charge of the defense; this it did not do, and judgment was rendered against plaintiffs in that action. The summons in an action upon the guaranty was served in this State upon a director of the defendant. On motion to set aside the service, *held*, that the cause of action arose in this State and the summons was properly served (Code of Civ.

Proc., § 432, subd. 3). *Childs v. Harris Mfg. Co.* 477

7. Where a contract of guaranty is entered into concurrently with the principal obligation, a consideration which supports the latter supports the former; and the consideration need not be expressed in the guaranty, but may be shown by parol. *Erie Co. Segs. Bk. v. Coit.* 532

8. Plaintiff held a bond and guaranty, delivered to it by the First National Bank, to secure deposits, which the latter undertook to repay with five per cent interest. At the request of plaintiff said bank executed to it a new bond which recited that it was executed in consideration of deposits made, or that might be made, which the obligor undertook to repay on demand, with interest at four per cent. On the bond was indorsed a guaranty, the consideration expressed therein being the making of the deposits mentioned in the bond. Four days after the receipt of the new bond and guaranty the others were surrendered. No deposits were made after the delivery of the new bond and guaranty, and the bank failed about a month thereafter. In an action upon the guaranty, *held*, it was a legitimate inference from the circumstances that the new bond was intended by the parties as a substitute for the original one, and the surrender of the latter was a good consideration for the guaranty; also, that it was immaterial whether the guarantors knew or did not know that the surrender of the old bond was in the contemplation of the parties when they became guarantors. *Id.*

GUARDIAN AND WARD.

1. No jurisdiction is conferred upon the Surrogate's Court by the Code of Civil Procedure, or by previous statutes, to judicially settle the accounts of a testamentary guardian, either on his own application or on that of any other person, while the guardianship continues, and an attempted settlement of

the kind, made either before or since the adoption of the Code is void for want of jurisdiction. *In re Hawley.* 250

2. *I seems*, the Surrogate's Court has jurisdiction to settle such an account, only in the three cases specified in said Code (§ 2847), *i. e.*, where the ward has attained his majority; where he has died, and where the guardian has been superseded by a successor. *Id.*

3. The provisions of the Code giving the Surrogate's Court authority on the application of the infant, or of a relative on his behalf, to compel such a guardian to render and file an account annually (§§ 2855, 2842, 2845), are intended merely to inform that court as to the manner in which the guardian is discharging his trust, but do not authorize the judicial settlement of such intermediate accounts, or the allowance of commissions on such accountings. *Id.*

4. S., by his will, divided his residuary estate into sixty parts, six of which he gave to his son A., an infant, for his sole and separate use and benefit, he appointed his executors, "guardians and trustees," of the estate of such of his children as should not be of the age of twenty-one at the time of his decease, to continue such until they should respectively arrive at that age. H., one of the executors named, alone qualified. *Held*, that he was not constituted by the will a trustee, within the meaning of the statute, but simply guardian, as the will created no trust, and that the statutory provisions in regard to the accountings of testamentary trustees were not applicable to him. *Id.*

5. The nature and extent of the jurisdiction of surrogates over testamentary trustees and guardians under the Revised Statutes, and under other statutes down to and including the Code of Civil Procedure, stated. *Id.*

HIGHWAYS.

1. Where the public have taken an easement for a street or highway,

and the surface of the land is above the grade of the highway, so that in order to reach the grade line it is necessary to remove the superincumbent material, this may be used on other portions of the road, on the premises of other land owners; but the public easement justifies only the taking of earth and soil which the process of construction or repair requires, and necessarily compels to be removed. *Robert v. Sadler.* 229

2. Where therefore, the defendants, in the performance of a contract with the public authorities for the construction of a highway across plaintiff's land, the surface of which was above the grade of the highway, not only removed the gravel and other materials above grade, but, also, dug and were digging pits in the highway to the depth of six feet below grade to get gravel with which to cover the roadway on lands not owned by plaintiff. *Held*, that plaintiff could maintain an action to restrain the further removal of the gravel. *Id.*

3. The smallness of the value of the fee in a highway does not justify a seizure of the fee without due and lawful authority or its destruction by indirect rulings. *Id.*

4. In an action by an owner of real estate, abutting on a street in the city of New York, against a corporation operating an elevated railroad constructed over said street, to recover damages to his property occasioned thereby. *Held*, that the doctrine of the case of *Story v. New York Elevated Railroad Company* (90 N. Y. 122), although pronounced by a divided court, must be considered as *stare decisis* upon all questions involved therein, not only questions which it expressly decides, but such as logically come within the principles therein determined. *Id.*

5. Abutters upon public streets in a city are entitled to such damages as they may have sustained by

reason of a diversion of the street from the use for which it was originally taken, and its illegal appropriation to other and inconsistent uses. *Lahr v. Met El. R. Co.*. 268

6. An elevated railroad in a street of a city, supported by columns placed along the outer line of the sidewalks, and operated by steam power, is a perversion of the use of the street from the purposes originally designed, and is a use which neither the city authorities nor the legislature can legalize or sanction, without providing compensation for the injury inflicted upon property of abutting owners. *Id.*

7. Abutters upon a public street of a city, claiming title to their premises by grant from the municipal authorities, which grant contains a covenant that a street to be laid out in front of such property shall continue forever thereafter as a public street, acquire an easement in the bed of the street for ingress and egress to and from their premises, and, also, for the free and uninterrupted passage and circulation of light and air. *Id.*

8. The ownership of such an easement is an interest in real estate, constituting property within the meaning of that term as used in the Constitution of the State, and requires compensation to be made therefor before it can lawfully be taken for public use. *Id.*

9. The erection and operation of an elevated railroad as aforesaid in the street, the use of which is intended to be permanent, constitutes a taking and appropriation of the easement by the railroad corporation rendering it liable to the abutters for the damages thereby occasioned. *Id.*

10. Also held, that no legal difference exists with reference to the interest acquired by abutting owners in a public street in the city of New York, between that created by a grant from the municipality with a covenant as afore-

said, or that acquired through a series of *meane* conveyances from the original owner whose property was taken in *invitum* by the city, by proceedings under the act of 1813 (2 R. L. 49, § 177), to be held as prescribed by said act, "in trust, nevertheless, that the same be appropriated and kept open for and as a part of a public street * * * forever in like manner as the other public streets * * * in the said city are, or of right ought to be;" that said proceedings not only created a valid trust in the city which would preclude it from any other use of the land acquired than that expressly described in the statute, but, also, constituted a contract between the city and the owner which runs with the land, and enures to the advantage of each successive grantee thereof. *Id.*

11. Also held, that it was not essential to the acquisition of an abutter's rights in the street that any land should have been originally taken from him, as in any event he is a party to the proceedings to appropriate the land for the same and liable to be assessed for its benefits, and therefore entitled to enjoy them; that the contract created by the statute and proceedings applies to all persons entitled to be heard, and enures equally to the benefit of all, although they may be unequally assessed for its cost. *Id.*

12. The duty of keeping the streets of the city of Troy in repair and free from obstructions is, under its charter, a corporate duty (§ 15, chap. 181, Laws of 1816; § 2, tit. 2, chap. 598, Laws of 1870.) *Kune v. City of Troy.* 344

13. The city was not relieved from the duty so imposed by the creation of the board of police commissioners under and by the act of 1870 (chap. 520, Laws of 1870); even assuming that board as so constituted is an independent body not subject to the control of the municipal corporation. The powers conferred and duties enjoined upon the police department by

said act in respect to the streets are auxiliary only, not exclusive.

Id.

14. To charge a city corporation with negligence, in not removing an obstruction unlawfully placed in one of its streets by a third person, it is not necessary to show express notice; if it appears from the circumstances that the municipal authorities charged with the care of its public streets ought to have known of the obstruction and to have caused its removal, and, if ignorant, that their ignorance resulted from the omission of the duty of inspection, and of the degree of diligence which might reasonably be expected, the city is equally chargeable as if express notice had been actually given. *Id.*

15. *It seems* that where the question of negligence in not removing such an obstruction depends upon implied notice, in determining what is a reasonable time from which notice is to be inferred, weight should be given to the consideration that municipal authorities cannot be expected to act with the promptness and celerity of individuals in conducting their private affairs. *Id.*

16. Plaintiff was riding along one of defendant's streets, the road-bed of which was thirty feet wide, macadamized and in good condition. On one side, where the street was graded up about twelve feet, there was a sidewalk ten feet wide, separated from the road-bed by a curbstone eight inches high. There was no fence, wall or other obstruction to guard the outer edge of the sidewalk. The horse attached to the wagon in which plaintiff was riding became frightened and commenced to shy, and, spite of the efforts of the driver, went over the curbstone and sidewalk and down the embankment, carrying the wagon and plaintiff with him. In an action to recover damages, for injuries received by plaintiff, it appeared that the street had been in the same condition since its opening, over ten years before, and, so far as appeared, no similar accident had occurred.

Held, that defendant was not liable; that the accident was one of a class so rare, unexpected and unforeseen, defendant could not be charged with negligence for a failure to guard against it. *Hubbell v. City of Yonkers.* 434

17. Also *held*, the principle was not altered by a provision in defendant's charter, giving it power, through its common council, "to compel or cause the making and repairing of railings at exposed places in the streets;" that as regards travel on the street this was not an exposed place. *Id.*

18. Where, by the charter of a municipal corporation, the duty is imposed upon it of keeping its streets and sidewalks in a reasonably safe and proper condition for public use, for a neglect to perform this duty it is liable for damages to persons who because thereof, without fault on their part, receive injuries. *Pomfrey v. Vil. Saratoga Springs.* 459

19. Actual notice to the proper municipal authorities of a defect is not necessary in order to charge it with negligence; they owe to the public the duty of active vigilance; and where a street or sidewalk has been out of repair for any considerable length of time, so that by reasonable diligence they could have notice of the defect, such notice may be imputed to them. *Id.*

20. Snow and ice which had fallen from time to time from a barn adjoining the sidewalk on one of defendant's streets, had accumulated on the sidewalk to the height of about three feet above the surface, and about two and a half feet above the snow on the rest of the sidewalk. This accumulation had been there about two weeks when plaintiff, in passing over it, fell and was injured. By defendant's charter (chap. 220, Laws of 1866) the care and custody of its streets are imposed upon its trustees, and it is made their duty to establish such ordinances and regulations as they may think proper, among other things, to provide for and regulate the repairing and cleaning

of streets and sidewalks, and power is given to raise money to discharge these duties. In an action to recover damages, *held*, that defendant was properly charged with negligence. *Id.*

21. It appeared that the street in question, with its sidewalks, had been open for its full width for about forty years; it was a principal street of the village and extensively used. Water mains were laid through it, and curb-stones had been placed along the sidewalks at the expense of the village. *Held*, the evidence justified a finding that the street, for its whole width, had been dedicated to and accepted by the public, and that it was legally one of the village streets. *Id.*

22. By defendant's charter, after provisions had been made for repairs of its streets and sidewalks, for the purpose of providing the means for defraying expenses, the board of trustees were authorized to raise annually a sum not exceeding an amount specified "for the support of roads * * * streets, lanes and alleys within the village." *Held*, that the word "streets" included the whole space between the outer lines thereof, *i. e.*, not only the roadway but the sidewalks; and that the money raised could be used as well for the repair of the sidewalks as the roadbed. *Id.*

23. The village superintendent, whose duty it was, under the direction of the trustees to make repairs, testified that he did not have any money in his hands for that purpose; there was no proof that there were not sufficient funds in the treasury of the village, which under the charter could have been placed in his hands. *Held*, the evidence failed to show want of funds to repair the sidewalk. *Id.*

24. It is within the discretion of commissioners of highways of a town, where they have not sufficient funds in their hands to make all needed repairs, to apply the funds in making such repairs as in their judgment are most ur-

gently needed, and they are not responsible for an error in judgment in doing so. *Monk v. Town of New Utrecht.* 552

25. Under the provisions of the statute prescribing the method of laying out highways in the towns of the county of K. (Chap. 670, Laws of 1869), and in compliance with the provisions of the act of 1873 (Chap. 864, Laws of 1873), directing the commissioners appointed by the former act to lay out "Eighty-sixth street," said street was laid out and constructed in accordance with the plan laid down by the commissioners. *Id.*

26. The street was graded up in one place about thirty feet above the adjoining land. No provision was made in the plan for a railing or fence on the outer lines of the road at the top of the bank. The commissioners of highways of the town of N. U. (defendant), upon whom is imposed the duty of keeping that portion of the street in their town, when completed, in repair, kept the roadway in repair, and in so doing expended all the moneys in their hands. In an action under the act of 1881 (Chap. 700, Laws of 1881), making towns liable in certain cases for injuries caused by a defective highway, to recover damages for injuries alleged to have been sustained by reason of negligence on the part of the commissioners in not erecting some barrier at the top of the bank. *Held: First.* The omission was not a defect in the highway. *Second.* Conceding it to have been such, as the commissioners of highways had expended the moneys in making other repairs they deemed more urgent, the town was not liable. *Third.* The defect if any, was in the plan and was not chargeable to the officers of the town. *Id.*

27. The street was laid out with a roadbed sixty feet wide, in the center of which was a street car track; on each side was a sidewalk eleven feet wide, raised about a foot above the level of the

road, bordered near the gutter with a row of trees. Plaintiff, who had been drinking heavily, was placed in the center of the road, on a clear starlit night, with directions to follow the car track to his place of destination; he wandered off the road and fell down the bank. *Held*, that he was chargeable with contributory negligence. *Id.*

HUSBAND AND WIFE.

See MARRIED WOMEN.

INDICTMENT.

1. Where an indictment under the Penal Code (§ 284) for seduction under promise of marriage, is defective in not giving the correct surname of the female, the court, on trial, has power to cure the defect by directing an amendment. *People v. Johnson.* 213
2. The provisions of the Code of Criminal Procedure, allowing such an amendment (§§ 6, 7, 275, 281, 293, 294, 295), are not violative of the provision of the State Constitution (art. 1, § 6) declaring that "no person shall be held to answer for a capital or otherwise infamous crime * * * unless upon presentment or indictment of a grand jury." *Id.*
3. An indictment charged, in substance, and the evidence justified a finding that defendant and others, with intent to extort money from the prosecutor, sent to him a letter, well knowing its contents, falsely accusing him of having had sexual intercourse with M., an unmarried female, resulting in pregnancy. The letter was set forth in the indictment; it purported to have been written by one of the accused, an attorney, and was addressed to the prosecutor. It alleged that the writer had been informed by M. of the fact of such intercourse and its results, and after referring to the liability in such case for the support of the child and the

mother's expenses during her sickness, concluded thus, "are you willing to make suitable provision for such liability and thereby avoid publicity, or will it be necessary to take legal steps in the matter." *Held*, that the indictment was good in substance, and the evidence justified a conviction. *People v. Wightman.* 598

INFANTS.

1. In an action for negligence causing injury to a child, so young as to be *non sui juris*, contributory negligence may not be imputed to the child; and so it is not sufficient to defeat a recovery to show that the injury would not have happened without the concurring act of the child, although if committed by an adult it would be a negligent one. There must also be concurring negligence on the part of the parents or guardian. *Kunz v. City of Troy.* 344
2. It is not *per se* negligence on the part of a parent or guardian to permit a child *non sui juris* to play in the street. *Id.*

INJUNCTION.

1. Where defendants, in the performance of a contract with the public authorities for the construction of a highway across plaintiff's land, the surface of which was above the grade of the highway, not only removed the gravel and other materials above grade, but, also, dug and were digging pits in the highway to the depth of six feet below grade to get gravel with which to cover the roadway on lands not owned by plaintiff. *Held*, that plaintiff could maintain an action to restrain the further removal of the gravel. *Robert v. Sadler.* 229
2. Where, the only relief the plaintiff would be entitled to on the facts agreed upon on submission of a controversy is an injunction, as that relief is expressly prohibited (§ 1281) in such a proceeding, the

submission should be dismissed.
Cunard Steamship Co. v. Voorhis.
 525

INSURANCE (LIFE)

1. A policy of insurance, issued on the tontine plan, on the life of S. recited that it was issued in consideration of a sum stated to have been paid by C. and six others named, the children of S., who were declared to be the assured; to whom the company agreed to pay the amount of assurance upon the death of the insured, or that in case he should be living at the time of the maturity of the policy, the holder or holders of the policy should be entitled to withdraw in cash the policy's share of the fund. In an action to determine as to who was entitled to this share, plaintiffs claimed under an assignment of the policy from S. to their testator, and defendant under assignments from the assured. *Held*, that plaintiffs acquired no right to the policy or the fund under the assignment from S., as the contract of the company was not with him, but by its express terms with the assured. *Ferdon v. Canfield.* 143

2. Plaintiffs claimed that the assignments to defendant were in some respects invalid. *Held*, that conceding this to be so, it was immaterial; it did not improve plaintiffs' title or authorize them to recover. *Id.*

INTEREST.

— Where estate of agent who had moneys placed in his hands for investment and reinvestment, but who mingled the same with his own funds, is properly chargeable with compound interest.

See In re Kernochan.

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JUDGMENT.

1. This action was brought against defendants, as executors of P., and

the complaint sought to charge them only in that capacity. After the trial an order was granted amending the summons and complaint and directing the judgment awarded to be entered against the defendants, individually and *de bonis propriis*. *Held*, that the order was properly reversed by the General Term; that the amendment substituted a new and different cause of action, which the defendants as individuals had had no opportunity to defend. *Van Cott v. Prentiss.* 45

2. The will of S. directed his executors to sell his real and personal estate, and, after paying his debts, funeral expenses and certain legacies, to divide the balance among the defendants herein. The executor sold and conveyed the real estate to one B. Defendants thereupon brought an action against the executor and B. to set aside the conveyance. The judgment therein granted the relief sought, and also decided that the land descended to the devisees, subject to the execution of the power, as the time for the execution thereof had expired, and that they were entitled to the possession as rightful owners, freed from the trusts. In an action under the Code of Civil Procedure (§ 1843) to charge defendants as such devisees with a debt of the testator. *Held*, it was to be assumed that the provision, above referred to, was inserted in said judgment at the request and by the procurement of the defendants, and when they took possession under the judgment this established their election to avoid a sale and take their legacies in the land itself instead of the proceeds; that they had the right to do this, no other rights intervening, or being prejudiced, that it might be, while this reconversion changed the legatees to devisees, it did not divest the heirs-at-law of their legal title, yet such legal title was purely formal, and the effect of defendants' election was, at least, to vest in them the equitable ownership and the entire beneficial interest, and therefore the action was maintainable. *Armstrong v. McKelvey.* 179

3. Aside from the provision in question, the will gave legacies to two of the defendants. The judgment herein, in making the apportionment of plaintiffs' claim, added to the share of each of these defendants the proportionate part of the legacies given them in excess of their co-tenants. *Held* no error; that having chosen to take their entire legacies in land, they became liable to creditors under the statute to the extent awarded. *Id.*

JUDICIAL SALES.

1. As to whether under the late bankrupt act a sale by an assignee in bankruptcy of the real estate of a bankrupt, made without an order of the bankruptcy court directing it, is void or not, *quære*. *Palmer v. Morrison*. 183
2. The case of *Smith v. Long* (12 Abb. [N. C.] 118), holding such a sale to be void, explained and the question stated to be still an open one. *Id.*

JURISDICTION.

1. No jurisdiction is conferred upon the Surrogate's Court by the Code of Civil Procedure, or by previous statutes, to judicially settle the accounts of a testamentary guardian, either on his own application or on that of any other person, while the guardianship continues, and an attempted settlement of the kind, made either before or since the adoption of the Code is void for want of jurisdiction. *In re Hawley*. 250
2. *It seems* the Surrogate's Court has jurisdiction to settle such an account only in the three cases specified in said Code (§ 2847) *i. e.*, where the ward has attained his majority; where he has died, and where the guardian has been superseded by a successor. *Id.*
3. As a Surrogate's Court is one of inferior and limited jurisdiction, those claiming under the decree of a surrogate must show affirma-

tively his authority to make it, and the facts which give him jurisdiction. *Id.*

4. The nature and extent of the jurisdiction of surrogates over testamentary trustees and guardians under the Revised Statutes, and under other statutes down to and including the Code of Civil Procedure, stated. *Id.*
5. After the rendition of a verdict of guilty in a criminal trial, at the request of defendant's counsel, the defendant was remanded until a day named for the purpose of a motion for arrest of judgment and for a new trial; no motion was made by either party on the day named or during the term. At the next term of the court, the same judge presiding, the district attorney moved for judgment, which was opposed on the ground that the court had no jurisdiction. *Held*, untenable; that it was fairly to be assumed that defendant, by not appearing, or offering to appear, on the day named, and by not objecting, waived the delay within the meaning of and as authorized by the provision of the Code of Criminal Procedure (§ 472), in reference to the time of pronouncing judgment after a verdict of guilty *People v. Everhardt*. 591
6. Where an order of General Term, reversing a judgment and granting a new trial, is affirmed on appeal to this court, the stipulation given on appeal compels an award of judgment absolute against the appellant, although it appears he was entitled to part of the relief granted by the judgment. *Conklin v. Snider*. 641
7. It is only where the error which might have justified a reversal of the judgment was merely incidental and capable of accurate correction, and so the judgment should have been corrected below without the award of a new trial, that this court may modify the judgment by correcting the error. *Id.*
8. This court has no jurisdiction to compel an appellant to attach to

the return copies of documents which were not part of the record in the court below. *States v. Cromwell*. 664

— *Jurisdiction of Court of Appeals confined to review of determination actually made by the court below, and must be had upon the papers before the General Term.*

See In re N. Y. C. Co. v. Mayor, etc. 1

— *When evidence sufficient to give court jurisdiction to issue attachment, and so its exercise not reviewable here.*

See N. P. Bank v. Whitmore. 297

LANDLORD AND TENANT.

1. Defendant leased to a Mrs. O'B. three rooms in a house, the windows of which overlook the flat roof of an extension. The lessee had a right to use the roof for the purpose of hanging out and drying clothes, but defendant cautioned her not to let children go on the roof, and she had never allowed them to go there. In this roof near one of the windows was a skylight. Plaintiff, an infant about three years old, whose mother, accompanied by him, had called on Mrs. O'B., fell out of the window, down through the skylight and was injured. There had been formerly a thin wire screen over the skylight to protect the glass, but it had become old and rotten and was removed about six weeks prior to the accident and had not been replaced. In an action to recover damages for the injury, *held*, that defendant had violated no duty which he owed to plaintiff and was not liable; that the latter could not take advantage of the violation, if any, of a duty plaintiff owed to Mrs. O'B., unless at the time of the accident he was in some way connected with her, *i. e.*, carrying out some right which she herself had. *Miller v. Woodhead*. 471

LEASE.

1. In 1871 the electors of the town of Gravesend passed a resolution,

to the effect that the common lands of the town on Coney Island should thereafter be let only by auction to the highest bidder, and prohibited the letting of any lot at a time more than one year prior to the expiration of any existing lease. The same restriction was contained in a resolution passed in 1866, before the system of public lettings was adopted. In 1878 a resolution was adopted, amending that of 1871, by adding a provision authorizing the commissioners to renew any existing lease upon terms they may deem most advantageous to the town. *Held*, that this did not authorize the commissioners to renew leases without restriction as to the time when the power should be exercised; but, that it was subject to the restriction contained in the resolution of 1871; and that a renewal lease, executed more than a year prior to the expiration of an existing lease of the lot, was void. *Tulyou v. Town of Gravesend*. 356

2. By the act of 1883 (Chap. 458, Laws of 1883), in reference to "the common lands of the town of Gravesend," the care, management and control of said lands are vested in the supervisors of the town, and the trustees chosen as specified therein, and it is provided that they "shall not have power to sell or give title to any lands of the town," with certain exceptions. As to the lands excepted they are authorized to sell "to the present lessees in possession of the same," provided the sale be confirmed by resolution at the annual town meeting. In an action by former lessees of one of the excepted lots, whose lease had expired, to restrain a sale of the lot to a third person, *held*, that the act operated as a mere license and authority to the board so constituted to sell, in their discretion, to the lessees, but did not obligate them to do so, that a lessee acquired no legal or equitable interest in the land by virtue of its provisions until a contract of sale had been perfected between him and the board, or unless he could show a case entitling him to the exercise of such discre-

tionary power. *Furey v. Town of Gravesend.* 405

8. At the annual town meeting in said town, in 1871, a resolution was adopted, to the effect that the common lands of the town should thereafter be let on notice at public auction to the highest bidder, and if any lot is let to any person other than the last lessee, the new lessee shall pay the former one "the value of improvements on the property at the expiration of the old lease," which condition shall be specified in the notice of letting. A lease of the land in question was duly executed to plaintiffs, which expired February 1, 1883. The only provision contained therein as to payment for improvements was one substantially as contained in the resolution. The land was not relet. *Held*, that no liability was imposed upon the town by the resolution, or the lease to pay for plaintiffs' improvements, or to lease the land again, and no absolute liability in reference thereto, except that of specifying the new lessee's liability in the notice to be given for leasing, in case it was determined to lease again, which specification could not be construed as anything more than a covenant that the town would take measures to cause the new tenant to pay for the improvements; that, as there had been no new lease, no breach had occurred; the town was entirely at liberty to refuse to lease again, and to dispose of the lands otherwise according to its discretion *Id.*

LEGATEES, NEXT OF KIN, HEIRS AND DEVISEES.

1. The will of S. directed his executors to sell his real and personal estate, and, after paying his debts, funeral expenses and certain legacies, to divide the balance among the defendants herein. The executors sold and conveyed the real estate to one B. Defendants thereupon brought an action against the executors and B. to set aside the conveyance. The judgment therein granted the re-

lief sought; and also decided that the land descended to the devisees, subject to the execution of the power, as the time for the execution thereof had expired, and that they were entitled to the possession as rightful owners, freed from the trusts. In an action under the Code of Civil Procedure (§ 1843) to charge defendants as such devisees with a debt of the testator. *Held*, it was to be assumed that the provision, above referred to was inserted in said judgment at the request and by the procurement of the defendants, and when they took possession under the judgment this established their election to avoid a sale and take their legacies in the land itself instead of the proceeds; that they had the right to do this, no other rights intervening, or being prejudiced; that it might be, while this reconversion changed the legatees to devisees, it did not divest the heirs-at-law of their legal title, yet such legal title was purely formal, and the effect of defendants' election was, at least, to vest in them the equitable ownership and the entire beneficial interest, and therefore the action was maintainable. *Armstrong v. McKelvey.* 170

2. The provision of said Code, under which the liability of devisees in such case arises, does not require, as a condition, that the legal title shall have passed, they are made liable "to the extent of the estate, interest and right in the real property which * * * was effectually devised to them." *Id.*
3. Aside from the provision in question, the will gave legacies to two of the defendants. The judgment herein, in making the apportionment of plaintiffs' claim, added to the share of each of these defendants the proportionate part of the legacies given them in excess of their co-tenants. *Held* no error; that having chosen to take their entire legacies in land, they became liable to creditors under the statute to the extent awarded. *Id.*

See WILLS.

LICENSE.

Where the public for a long period of time have notoriously and constantly been in the habit of crossing a railroad at a point not in a traveled public highway, with the acquiescence of the railroad corporation, this acquiescence amounts to a license, and imposes a duty upon it, as to all persons so crossing, to exercise reasonable care in the running of its trains, so as to protect them from injury. *Byrne v. N. Y. C., etc.* 362

LIEN.

Where the owner of a chose in action, after a transfer for a good consideration of an interest therein to one person, assigns and transfers the same to a *bona fide* purchaser with authority to collect, the latter is not entitled to retain the whole proceeds of collection. The first transferee acquires an equitable lien upon the proceeds of collection to the extent of the interest transferred to him; the second transferee takes subject to such lien, and an action is maintainable against him to enforce the same. *Fairbanks v. Sargent.* 108

LIMITATION OF ACTIONS.

1. Although the statute of limitations does not apply to the issuing of a writ of *mandamus*, the writ should not be granted after the period fixed by statute as a bar to an action has expired, when the delay is unexplained and unaccounted for. *People ex rel. Millard v. Chapin.* 96
2. In an action to recover back an illegal assessment it appeared that the order vacating the assessment was granted December 4, 1871. Plaintiff presented his claim to the comptroller November 17, 1877, pursuant to the requirements of the city charter (§ 105. chap. 385 Laws of 1873) and this action was commenced December 18, 1877. The statute of limitations was

pleaded as a defense, but the complaint was dismissed upon the trial wholly upon other grounds. *Held*, that the statute could not be invoked to sustain the dismissal, as, if error was committed in the ruling, it could not be cured by raising a question on appeal not raised on the trial; also, *held*, that the claim was not barred by the statute, that as, by the Code of Civil Procedure (§ 406), "when the commencement of an action has been stayed * * * by statutory prohibition, the time of the continuance of the stay is not a part of the time limited for the commencement of the action," and as by the city charter (§ 105) plaintiff was prohibited from bringing suit until after the lapse of thirty days from the presentation of the claim, the running of the statute was suspended during the thirty days. *Brehm v. Mayor, etc.* 186

3. Also, *held*, that the question was not affected by the provision of said Code (§ 410), which declares that when a demand is necessary to entitle a party to maintain an action, the time within which the action must be commenced must be computed from the time when the right to make the demand is complete; that this provision only applies where an immediate right of action follows a demand. *Id.*
4. *It seems*, the presentation of the claim, although a necessary preliminary to the bringing of a suit against the city, is not the commencement of an action or proceedings to collect the claim within the meaning of the statute of limitations. *Id.*
5. H., defendant's intestate, executed to the executors of S. two written instruments, by each of which he promised to pay to them as such executors at his death, if he died without heirs, a sum specified, which the instrument described as a fund held by the executors in trust, in which H. had a life estate, with remainder over to his heirs. H. died leaving an heir. In an action to recover the sum specified, *held*, that as the cause of action did not accrue until after the death

of H., the statute of limitations did not begin to run until then and, as the action was brought within the time limited after such death, it was not barred. *Lee v. Horton*. 538

6. On hearing before the board of claims of a claim for an unlawful diversion of the waters of Seneca river, it appeared that the diversion for which the claim was made was for the years 1882, 1883 and 1884. The claim was filed in August, 1884. *Held*, that the statute of limitations was not a bar to the claims for 1883 and 1884; that each day the unlawful use was continued a new cause of action arose, and that, as no recovery could be had for future damages, a failure to file a claim within the time limited by the statute, after the commencement of the unlawful diversion, had no effect on the rights of the claimant to recover damages sustained within the two years limited. *Silsby Mfg. Co. v. State*. 562

LONG ISLAND CITY.

The provision of the original charter of Long Island City (chap. 719, Laws of 1870), giving to the common council power to employ and pay an attorney, is repugnant to and was repealed by the amended charter (chap. 461, Laws of 1871), and under the latter the common council is placed under an absolute disability to create any debt or liability on the part of the city for legal services. *Lyddy v. L. I. City*. 213

MANDAMUS.

1. While the courts may, by *mandamus*, act in certain cases affecting corporate matters, they can only do so where the duty concerned and thus attempted to be enforced is specific and plainly imposed upon the corporation. *People v. N. Y. L. E. & W. R. R. Co.* 58
2. The Supreme Court has no jurisdiction to grant a writ of *man-*

damus on behalf of the people, at the instance of the attorney-general, requiring a railroad corporation to erect a building at a station on its road of sufficient capacity to accommodate the passengers and freight business at that place, although it appears, and is conceded by the corporation, that its station building is entirely inadequate for these purposes and that the absence of a suitable depot building and warehouse is a serious injury to the public doing business at that station, and although it appears that upon a complaint made to the railroad commissioners, and, upon notice to the defendant, that body adjudged and recommended that the company should construct a suitable building within a time named, with which recommendation it refused to comply, not for want of means, but because its directors decided not to do so. *Id.*

3. The discretion of the court to grant or refuse a writ of *mandamus* is not absolute but is governed by legal rules, and its exercise is subject to review here. *People ex rel. Millard v. Chapin*. 96
4. The sufficiency of the evidence upon which is based a decision of the State comptroller as to who is entitled to the purchase-money paid upon an invalid sale of land for taxes, which he is required to refund out of the State treasury (§§ 80, 83, 85, chap. 427, Laws of 1855), may not be reviewed by *mandamus*; nor can the decision, even if wrong, be so rectified. *Id.*
5. The writ does not lie to compel an officer exercising judicial functions to make any particular decision or to set aside a decision already made. *Id.*
6. Although the statute of limitations does not apply to the issuing of a writ of *mandamus*, the writ should not be granted after the period fixed by statute as a bar to an action has expired, when the delay is unexplained and unaccounted for. *Id.*
7. *It seems*, that the writ may also, in the discretion of the court, be

denied when the delay in moving it is unreasonable, although it falls short of the time allowed for commencing actions. *Id.*

MANUFACTURING CORPORATIONS.

1. As the rights and liabilities under the penal provisions of the General Manufacturing Act (Chap. 40, Laws of 1848), are not only "regulated by special provision of law," but have no existence outside of the statute, the right of transfer given by the Code of Civil Procedure (§1910), does not under said Code give a right of enforcement to the transferee (§1909), but leaves the question of that right to the existing law. *Blake v. Griswold.* 618

2. The rule of the common law governs the question as to the survivability of a cause of action, to recover the penalty imposed by said act upon a trustee of a corporation organized under it, who has joined in making a false annual report; it is not affected by any provision of the Code, and the action abates upon the death of either party. *Id.*

MARRIED WOMEN.

In an action to recover dower it appeared that plaintiff, during the life-time of her husband, who had been declared a lunatic, and a committee of his estate appointed, entered into a contract with the committee and the children of her husband, and executed to them a deed, by which, in consideration of the receipt by her of about one-third of her husband's property, she released all interest in his estate, including "her inchoate right of dower (if any exists), of, in and to any and all real estate," of her husband, and also covenanted at any future time on demand to execute all necessary deeds, releases or transfers, to carry out the intention of the parties, "namely, the full and perfect release" of her "inchoate

and other rights in the property" of her husband, which she had or might have at the time of the death; and she also covenanted not to make any claim therefor on the death of her husband. *Held*, that plaintiff was not entitled to dower; that there was under the agreement and within the meaning of the Revised Statutes (1 R. S. 741, §§ 12, 18, 14), a pecuniary provision made in lieu of dower; and, as plaintiff had retained that provision and never offered to return it, she must be deemed to have elected to keep it in lieu of dower. *Jones v. Fleming* 418

MERGER.

1. Where the mortgage of a third person has been assigned by the mortgagee as collateral for his own debt, the foreclosure of the mortgage and purchase at the foreclosure sale by the assignee, as against the assignor, where the latter is not made a party to the foreclosure and his equitable right foreclosed, simply substitutes the land for the mortgage and the assignee holds it as a security merely, subject to the right of the assignor to redeem by payment of the debt. The doctrine of merger does not apply in such case, as in equity merger will never be allowed against the interest of the parties or their obvious intention, or where the two estates are held in different rights. *In re Gilbert.* 200

2. Where the plaintiff in an action against the trustee of a manufacturing corporation for making a false annual report dies, after the rendition of judgment, the action does not abate and the cause of action is merged in the judgment, which passes as assets to the representatives of the deceased, and they are entitled to be substituted in his place. (Code of Civ. Pro., §§ 1912, 1297, 1298.) *Blake v. Griswold.* 618

MORTGAGE.

1. One who purchases land, subject to a mortgage, makes the land

- thereby the primary fund for the payment of the mortgage debt, and this is so, although the deed contains a covenant on the part of the grantee to pay the mortgage debt. The covenant is to indemnify the grantor against the contingency that the land may not bring enough to pay such debt. *In re Wilbur v. Warren.* 192
2. W. purchased certain real estate, subject to a mortgage thereon, which by his deed he assumed and agreed to pay. He conveyed the land to his daughter by deed containing full covenants, in which no reference was made to the mortgage. The only consideration for the deed was natural love and affection. W., after the conveyance, paid part of the mortgage. The daughter, after his death, paid interest on the balance, and for the amount so paid presented a claim against his estate. *Held*, that the land was the primary fund for the payment of the mortgage, and the daughter took it subject to that burden; that the covenants in the deed were invalid and W. incurred no obligation, legal or equitable, to pay the mortgage in exoneration of the land, and that, therefore, the claim was improperly allowed. *Id.*
 3. Where the mortgage of a third person has been assigned by the mortgagee as collateral for his own debt, the foreclosure of the mortgage and purchase at the foreclosure sale by the assignee, as against the assignor, where the latter is not made a party to the foreclosure and his equitable right foreclosed, simply substitutes the land for the mortgage and the assignee holds it as a security merely, subject to the right of the assignor to redeem by payment of the debt, and upon such payment he is entitled to the land. *In re Gilbert.* 200
 4. The doctrine of merger does not apply in such case, as in equity merger will never be allowed against the interest of the parties or their obvious intention, or where the two estates are held in different rights. *Id.*
 5. F. & W., who were copartners, executed two mortgages, one to secure a bond executed by F., the other a bond executed by both. Each of the bonds was given for partnership indebtedness. The mortgages covered certain lands owned by F. & W. jointly, also lands owned by F. alone. F. & W. subsequently conveyed the mortgaged lands owned by them, by full covenant deed, for a price that covered the full value of the unincumbered fee. F. died, and thereafter plaintiff, the administratrix of the mortgagee, negotiated a settlement of various claims the estate held against W., and plaintiff executed to W. a release and discharge, among other things, of all several and joint liability on account of the bonds and mortgages, which release recited that it was not intended "to affect or discharge the liability" of F., "or intended to affect any other security for any of said demands other than the personal liability of" W. In an action to foreclose the mortgages, *held*, that the release discharged the party primarily liable for the mortgage debt, and so cut off and destroyed the equitable right of subrogation belonging to the surety in case of payment, and, therefore, that the lien of the mortgages upon the lands bound as security was discharged. *Murray v. Foz.* 382
 6. Prior to the execution of the release by plaintiff, W. compromised with the said grantee of a portion of the mortgaged premises certain claims, held by it, and received a release of himself and the heirs of F. upon the covenants in the deed, and from all existing debts, matured and unmatured, with a covenant that the releasor had not parted with or impaired its title "to any such debts." *Held*, that the release of the covenants in the deed did not *ipso facto* discharge the equities which might arise in favor of the covenantee against the covenantor, or make the land principal debtor for the mortgage; but that it remained chargeable only as surety, and the right of subrogation remained,

which was cut off by plaintiff's release. *Id.*

See FORECLOSURE.

MOTIONS AND ORDERS.

1. The action was brought against defendants, as executors of P., and the complaint sought to charge them only in that capacity. After the trial an order was granted amending the summons and complaint and directing the judgment awarded to be entered against the defendants individually and *de bonis propriis*. *Held*, that the order was properly reversed by the General Term; that the amendment substituted a new and different cause of action, which the defendants as individuals had no opportunity to defend. *Van Cott v. Prentice*. 45
2. An order of a surrogate, adjudging against the denial of an administrator, that there are assets of the estate in his hands, and requiring him to account therefor, is an order affecting a substantial right, and so is appealable to the General Term. (Code of Civil Procedure, § 2570.) *In re Gilbert*. 300
3. It is not essential to such an appeal that the order be a "final" one, as is requisite to authorize a review thereof in this court. (§ 190.) *Id.*
4. Exceptions herein were ordered to be heard at first instance at General Term, and upon argument there an order was made denying motion for new trial, overruling the exceptions and directing judgment on the verdict. Defendant appealed from the order and from the judgment entered thereon. Plaintiffs claimed the order was not appealable, and that the appeal from the judgment brought up nothing for review but the question whether the judgment was in accordance with the order, as there was no statement in the notice of appeal that the appellant intended to bring up

for review an intermediate order as required by the Code of Civil Procedure (§§ 1801, 1816). *Held*, that the order was not an intermediate order within the meaning of the Code, and that while the appeal therefrom was useless, yet, as it was taken in connection with the appeal from the judgment, it was not necessary to dismiss it, as the latter brought up all the exceptions for review. *Becker v. Koch*. 394

5. An appeal may not be taken to this court from an order of General Term affirming a judgment; so, also, where there is both an appeal to the General Term from a judgment and from an order denying a motion for a new trial, and the judgment and order are affirmed, an appeal is not authorized from so much of the order as affirms the order denying a new trial. Such an appeal brings no question before this court not involved in an appeal from a judgment entered on the General Term order. Judgment should first be entered on such order and an appeal taken from that. *Derleth v. De Graff*. 601
6. Where, upon trial of an issue of fact by the court or referee, an interlocutory judgment is rendered from which an appeal is taken, and also a motion for a new trial is made at the General Term as authorized by the Code of Civil Procedure (§ 1001), and an order is entered by that court affirming the judgment and denying the motion, so much of the order as denies the new trial is reviewable on appeal to this court. (Code of Civ. Pro. § 190, subd. 2.) *Kelsey v. Sargent*. 663

MUNICIPAL CORPORATIONS.

1. A person can contract with a municipal corporation only through its authorized agents, and is chargeable with notice of the limitations upon their official authority imposed by general laws. *Lyddy v. L. I. City*. 218

2. Where the common council of a city has no authority to create a liability against it by express contract, it cannot legalize such a claim by acknowledgment, ratification or otherwise. *Id.*

3. To charge a city corporation with negligence, in not removing an obstruction unlawfully placed in one of its streets by a third person, it is not necessary to show express notice; if it appears from the circumstances that the municipal authorities charged with the care of its public streets ought to have known of the obstruction and to have caused its removal, and, if ignorant, that their ignorance resulted from the omission of the duty of inspection, and of the degree of diligence which might reasonably be expected, the city is equally chargeable as if express notice had been actually given. *Kunz v. City of Troy.* 344

4. *It seems* that where the question of negligence in not removing such an obstruction depends upon implied notice, in determining what is a reasonable time from which notice is to be inferred, weight should be given to the consideration that municipal authorities cannot be expected to act with the promptness and celerity of individuals in conducting their private affairs. *Id.*

5. Where, by the charter of a municipal corporation, the duty is imposed upon it of keeping its streets and sidewalks in a reasonably safe and proper condition for public use, for a neglect to perform this duty it is liable for damages to persons who because thereof, without fault on their part, receive injuries. *Pomfrey v. Vil Saratoga Springs.* 459

6. Actual notice to the proper municipal authorities of a defect is not necessary in order to charge it with negligence; they owe to the public the duty of active vigilance; and where a street or sidewalk has been out of repair for any considerable length of time, so that by reasonable diligence they could have notice of the de-

fect, such notice may be imputed to em. *Id.*

— *When not chargeable with negligence in omitting railing on side of a street where there is an embankment.*

See Hubbell v. City of Yonkers. 434

See LONG ISLAND CITY.

NEW YORK (CITY OF).

SARATOGA SPRINGS (VILLAGE OF).

TROY (CITY OF).

YONKERS (CITY OF).

MURDER

1. Where, upon the trial of an indictment for murder, the admissibility of statements made by the deceased, which are offered in evidence as dying declarations, is brought in question, it is the duty of the court to determine, as a preliminary issue, whether the alleged declarations were made by the deceased under a conviction of approaching and imminent death. *People v. Smith.* 491
2. Such preliminary examination may, in the discretion of the court, be conducted in the presence of the jury; but during it they stand simply in the attitude of spectators; with the testimony given they have no concern, it being merely for the information of the court, and until by its ruling some portion of it is presented to the jury as competent evidence in the case, there is nothing to which the defendant may except as constituting legal error. (ANDREWS and PECKHAM, JJ., dissenting.) *Id.*

NAVIGATION.

- 1 The character of an American vessel is to be determined by reference to the United States statute upon the subject and the ship's papers. *Chase v. Belden.* 80
2. In an action against the owner of the steam yacht "Yosemite," to recover damages for alleged negligence in colliding with and

sinking plaintiff's steamboat, it appeared that the "Yosemite" was described in her license as a yacht "used and employed exclusively as a pleasure vessel and designed as a model of naval architecture." By the United States statutes (§ 2, chap. 141, U. S. Laws of 1848) the secretary of the treasury was authorized to cause such yachts, if entitled to be enrolled as American vessels, to be licensed "to proceed from port to port of the United States without entering or clearing at the custom house," or exclusively as coasting vessels. By an amendment of said statute (§ 2, chap. 170, U. S. Laws of 1870; U. S. R. S., § 4214) the words "and by sea to foreign ports" were added. The "Yosemite" was, at the time of the injury complained of, enrolled at the port of New York. Her certificate of enrollment recited that it was given in conformity to the title of the United States Revised Statutes, which relates exclusively to coasting and fishing vessels. Her license was a coasting license, with the added privilege of going by sea to foreign ports. The "Yosemite," at the time of the injury complained of, was proceeding up the Hudson river under steam. She carried the lights prescribed for ocean going steamers and steamers carrying sail (U. S. R. S., § 4233, rule 3), but did not carry the "central range of two white lights" prescribed for coasting vessels navigating inland waters (Rule 7). *Held*, that the "Yosemite" was, at the time of the accident, navigating under her license in the character of a coasting vessel; that she was in fault in not carrying the lights prescribed for such vessels, and that the trial court erred in nonsuitor plaintiff. 7d.

3. *It seems*, if the collision had happened upon the high seas, another question would have been presented. *Id.*

NEGLIGENCE.

1. In an action against the owner of the steam yacht "Yosemite," to

recover damages for alleged negligence in colliding with and sinking plaintiff's steamboat, it appeared that the "Yosemite" was described in her license as a yacht "used and employed exclusively as a pleasure vessel and designed as a model of naval architecture." By the United States statutes (§ 2, chap. 141, U. S. Laws of 1848) the secretary of the treasury was authorized to cause such yachts, if entitled to be enrolled as American vessels, to be licensed "to proceed from port to port of the United States without entering or clearing at the custom house," or exclusively as coasting vessels. By an amendment of said statute (§ 2, chap. 170, U. S. Laws of 1870; U. S. R. S., § 4214) the words "and by sea to foreign ports" were added. The "Yosemite" was, at the time of the injury complained of, enrolled at the port of New York. Her certificate of enrollment recited that it was given in conformity to the title of the United States Revised Statutes, which relates exclusively to coasting and fishing vessels. Her license was a coasting license, with the added privilege of going by sea to foreign ports. The "Yosemite" at the time of the injury complained of, was proceeding up the Hudson river under steam. She carried the light prescribed for ocean-going steamers and steamers carrying sail (U. S. R. S., § 4233, rule 3), but did not carry the "central range of two white lights" prescribed for coasting vessels navigating inland waters (Rule 7). *Held*, that the "Yosemite" was, at the time of the accident, navigating under her license in the character of a coasting vessel; that she was in fault in not carrying the lights prescribed for such vessels, and that the trial court erred in nonsuitor plaintiff. *Chase v. Belden.* 86

2. *It seems*, if the collision had happened upon the high seas, another question would have been presented. *Id.*

3. To charge a city corporation with negligence, in not removing an obstruction unlawfully placed in

one of its streets by a third person, it is not necessary to show express notice; if it appears from the circumstances that the municipal authorities charged with the care of its public streets ought to have known of the obstruction and to have caused its removal, and, if ignorant, that their ignorance resulted from the omission of the duty of inspection, and of the degree of diligence which might reasonably be expected, the city is equally chargeable as if express notice had been actually given.

Kunz v. City of Troy. 344

4. *It seems* that where the question of negligence in not removing such an obstruction depends upon implied notice, in determining what is a reasonable time from which notice is to be inferred, weight should be given to the consideration that municipal authorities cannot be expected to act with the promptness and celerity of individuals in conducting their private affairs. *Id.*

5. In an action for negligence causing injury to a child, so young as to be *non sui juris*, contributory negligence may not be imputed to the child; and so it is not sufficient to defeat a recovery to show that the injury would not have happened without the concurring act of the child, although if committed by an adult it would be a negligent one. There must also be concurring negligence on the part of the parents or guardian. *Id.*

6. It is not *per se* negligence on the part of a parent or guardian to permit a child *non sui juris* to play in the street. *Id.*

7. In an action against the city of Troy to recover damages for alleged negligence causing the death of G., plaintiff's intestate, it appeared that one McL. placed a large heavy counter on the sidewalk of a frequented street in a busy part of the city, tilted in such a manner as to be easily thrown down. Four days afterward, G., a child between five and six years, was playing around the

counter with two other children of about the same age, when the counter was thrown down by the children running against or jumping upon it, it fell upon G., inflicting injuries which caused his death. There was evidence tending to show that G's father went into a store near by, leaving G. at the door, cautioning him not to go far away; the father returned in from two to five minutes, and during that time the accident happened. By a city ordinance the placing of obstructions on the streets, except when done under a license, is prohibited, and certain of the city officials named are authorized to order any obstructions to be removed. *Held*, that the court erred in directing a non-suit. *Id.*

8. Where the public for a long period of time have notoriously and constantly been in the habit of crossing a railroad at a point not in a traveled public highway, with the acquiescence of a railroad corporation, this acquiescence amounts to a license, and imposes a duty upon it, as to all persons so crossing, to exercise reasonable care in the running of its trains, so as to protect them from injury. *Byrne v. N. Y. C., etc.* 362

9. Although not absolutely bound to ring a bell or blow a whistle upon the locomotive of a train, approaching such a crossing, the company is bound to give some notice and warning, and as to what is sufficient is a question of fact or a jury. *Id.*

10. Where a train is backing toward the crossing, the fact that the bell was rung does not, as matter of law, establish reasonable care; it is for the jury to determine as to whether any other precautions should have been taken upon the train, under the circumstances. *Id.*

11. Plaintiff was riding along one of defendant's streets, the road-bed of which was thirty feet wide, macadamized and in good condition. On one side, where the street was graded up about twelve

- feet, there was a sidewalk ten feet wide, separated from the road-bed by a curbstone eight inches high. There was no fence, wall or other obstruction to guard the outer edge of the sidewalk. The horse attached to the wagon in which plaintiff was riding became frightened and commenced to shy, and, spite of the efforts of the driver, went over the curbstone and sidewalk and down the embankment, carrying the wagon and plaintiff with him. In an action to recover damages, for injuries received by plaintiff, it appears that the street had been in the same condition since its opening, over ten years before, and, so far as appeared, no similar accident had occurred. *Held*, that defendant was not liable; that the accident was one of a class so rare, unexpected and unforeseen, defendant could not be charged with negligence for a failure to guard against it. *Hubbell v. City of Yonkers.* 434
12. Also *held*, the principal was not altered by a provision in defendant's charter, giving it power, through its common council, "to compel or cause the making and repairing of railings at exposed places in the streets;" that as regards travel on the street this was not an exposed place. *Id.*
13. Where, by the charter of a municipal corporation the duty is imposed upon it of keeping its streets and sidewalks in a reasonably safe and proper condition for public use, for a neglect to perform this duty it is liable for damages to persons who because thereof, without fault on their part, receive injuries. *Pomfrey v. Vil. Saratoga Springs* 459
14. Actual notice to the proper municipal authorities of a defect is not necessary in order to charge it with negligence; they owe to the public the duty of active vigilance; and where a street or sidewalk has been out of repair for any considerable length of time, so that by reasonable diligence they could have notice of the defect, such notice may be imputed to them. *Id.*
15. Snow and ice which had fallen from time to time from a barn adjoining the sidewalk on one of the defendant's streets, had accumulated on the sidewalk to the height of about three feet above the surface, and about two and a half feet above the snow on the rest of the sidewalk. This accumulation had been there about two weeks when plaintiff, in passing over it, fell and was injured. By defendant's charter (Chap. 220, Laws of 1866) the care and custody of its streets are imposed upon its trustees, and it is made their duty to establish such ordinances and regulations as they may think proper, among other things, to provide for and regulate the repairing and cleaning of streets and sidewalks, and power is given to raise money to discharge these duties. In an action to recover damages, *held*, that defendant was properly charged with negligence. *Id.*
16. Upon the trial plaintiff offered in evidence an ordinance of the village which imposed penalties upon persons who should throw snow or ice from roofs upon sidewalks, or who should neglect to keep sidewalks in front of their lots and buildings clear of snow and ice; this was received under objection and exception *Held*, no error. *Id.*
17. A witness called for the plaintiff after she had testified as to the condition of the sidewalk, and that a person had to be very careful, or fall, as she knew from experience, was permitted to testify, under objection, that she fell down in the same place. *Held*, no error. *Id.*
18. The evidence tended to show that this embankment of snow and ice was perfectly visible; there was a light covering of recent snow over the ice. *Held*, a refusal of the court to charge as matter of law, that it was negligence for plaintiff, under the circumstances, to pass over the embankment was not error. *Id.*

19. Defendant leased to a Mrs. O'B. three rooms in a house, the windows of which overlook the flat roof of an extension. The lessee had a right to use the roof for the purpose of hanging out and drying clothes, but defendant cautioned her not to let children go on the roof, and she had never allowed them to go there. In this roof near one of the windows was a skylight. Plaintiff, an infant about three years old, whose mother, accompanied by him, had called on Mrs. O'B., fell out of the window, down through the skylight and was injured. There had been formerly a thin wire screen over the skylight to protect the glass, but it had become old and rotten and was removed about six weeks prior to the accident and had not been replaced. In an action to recover damages for the injury, *held*, that defendant had violated no duty which he owed to plaintiff and was not liable; that the latter could not take advantage of the violation, if any, of a duty plaintiff owed to Mrs. O'B., unless at the time of the accident he was in some way connected with her, *i. e.*, carrying out some right which she herself had. *Miller v. Woodhead.* 471
20. Under the provisions of the statute prescribing the method of laying out highways in the towns of the county of K. (Chap. 670, Laws of 1869), and in compliance with the provisions of the act of 1873 (Chap. 364, Laws of 1873), directing the commissioners appointed by the former act to lay out "Eighty-sixth street," said street was laid out and constructed in accordance with the plan laid down by the commissioners. The street was graded up in one place about thirty feet above the adjoining land. No provision was made in the plan for a railing or fence on the outer lines of the road at the top of the bank. The commissioners of highways of the town of N. U. (defendant), upon whom is imposed the duty of keeping that portion of the street in their town, when completed, in repair, kept the roadway in repair, and in so doing expended all the moneys in their hands. In an action under the act of 1881 (Chap. 700, Laws of 1881), making towns liable in certain cases for injuries caused by a defective highway, to recover damages for injuries alleged to have been sustained by reason of negligence on the part of the commissioners in not erecting some barrier at the top of the bank. *Held: First.* The omission was not a defect in the highway. *Second.* Conceding it to have been such, as the commissioners of highways had expended the moneys in making other repairs they deemed more urgent, the town was not liable. *Third.* The defect, if any, was in the plan, and was not chargeable to the officers of the town. *Monk v. Town New Utrecht.* 552
21. The street was laid out with a roadbed sixty feet wide, in the center of which was a street car track; on each side was a sidewalk eleven feet wide, raised about a foot above the level of the road, bordered near the gutter with a row of trees. Plaintiff, who had been drinking heavily, was placed in the center of the road on a clear, starlit night, with directions to follow the car track to his place of destination. He wandered off the road and fell down the bank. *Held*, that he was chargeable with contributory negligence. *Id.*
22. Where in an action to recover damages for injuries sustained by a child of tender years, who, when passing along a public street where it crossed a railroad track, was struck by a train, it appeared that the child exercised the degree of care and prudence required of a person *sui juris*, *held*, it was immaterial that the parents of the child were guilty of negligence in permitting it to be on the streets; and so the reception of improper evidence offered to excuse such negligence was not a ground for reversal. *Cumming v. B. O. R. P. Co.* 669
23. *It seems*, evidence that the parents were unable to hire any servant or person to aid the mother in

looking after the child is not competent to rebut proof of negligence on her part. *Id.*

24. In such an action, *held*, that a municipal ordinance, prohibiting railroad companies from stopping its cars at a street intersection, so that they will interfere with travel on the cross streets, was properly received in evidence on the question of defendant's negligence, in connection with evidence that a train had stopped in violation of this ordinance, which prevented the plaintiff from seeing the approaching train. *Id.*

— *When evidence as to contributory negligence insufficient to justify nonsuit.*

See *Sherry v. N. Y. U. & H. R. R. Co.* (Mem.) 653

NEW YORK (CITY OF).

1. The intent of the provision of the "Rapid Transit Act" (§ 6), requiring the commissioners appointed by the mayor of a city to fix and determine the time within which the proposed railway or railways, or portions thereof shall be constructed, is to limit the corporation in respect only to time during which it is possible for it to prosecute the work, excluding time when legal barriers exist to such prosecution. *N. Y. Cable Co. v. Mayor, etc.* 1
2. Where, therefore, the commissioners appointed by the mayor of New York specified a time within which each of twenty-nine different routes located by them should be completed, but provided that the time should begin to run from the date of the obtaining the requisite consent of property owners and of the local authorities, or, in case of failure to procure such consent, from the date of the confirmation of the report of commissioners appointed by the court; and also provided that the time unavoidably consumed by the pendency of legal proceedings or the interference of public authorities, or the omission to open

or grade shall not be deemed a part of the time limited. *Held*, that this was a substantial compliance with the act. *Id.*

3. The articles of association, framed by the mayor's commissioners, instead of providing, as required by said act (§ 7), for the release and forfeiture to the supervisors of the county of all the rights and franchises acquired by the corporation, in case the proposed railways were not completed in time, provided, that in case the several portions of such railways were not completed each within the time limited, the rights and franchises "for and as to any portion of such railway or railways not so completed," shall be released and forfeited. *Held*, that this was a material departure from the requirements of the act; that the provision should have been for the release and forfeiture of all the rights and privileges; that the provision was an attempt to override the action of the Legislature in refusing to make the amendment to the "Rapid Transit Act" of 1882 (§ 2, Chap. 393, Laws of 1882), applicable to the city of New York, by incorporating the substance of the amendment in the articles of association. *Id.*
4. Also, *held*, that as there was no general law, declaring a forfeiture or requiring a release to the supervisors, a compliance with the provision was necessary to carry out the legislative intent, and the failure to comply was a fatal defect in the articles. *Id.*
5. Also, *held*, that while by the act of 1870 (Chap. 190, Laws of 1870) the board of supervisors of the county of New York, composed of supervisors, as before elected or appointed, was declared abolished, a new board of supervisors was created (Chap. 187, Laws of 1870) and is in existence to which the franchises of the company may be forfeited and released. *Id.*
6. Under the provision of the Rapid Transit Act (§ 5), requiring the mayor's commissioners to fix the plan or plans for the construc-

tion of the railway or railways, it is, at least, essential that they shall determine whether the contemplated road shall be an underground, overground or surface road, and a failure on their part to determine this question is a failure to comply with one of the conditions precedent to the acquisition of corporate power. *Id.*

7. By the resolutions of the commissioners, incorporated in the articles of association, as to several of the routes laid out, it was left to the subsequent election of the company whether they should be surface or elevated roads. As to other routes, where the articles provided for elevated roads, with a double track, authority was given to the company to add such other tracks as might, from time to time, be needed to accommodate increasing traffic and to make such additions to the structures as might be needed. It was, also, left to the company to determine as to the method of supporting the tracks, *i. e.*, whether they should be carried on longitudinal girders resting on the top of columns or by transverse girders supported by columns. The power to erect stations and platforms was not restricted or defined, but it was left to the company to decide where they were necessary, it was authorized to occupy so much of the sidewalks for stairways and approaches "as may be necessary," and also to construct "such supports, turnouts * * * stations, buildings, platforms, stairways * * * and such other requisite appliances as shall be proper." *Held*, that the commissioners failed to substantially comply with the act, and that as such compliance was essential there was no valid organization of the petitioner. *Id.*

8. The board of assessors of the city of New York, in performing the duties imposed upon it by the act of 1872 (Chap. 729, Laws of 1872), in relation to the improvements of Eighth avenue in that city, did not act as the servants or officers of the municipal corporation, but as an independent tribunal, deriving its whole authority

from the statute. *Heiser v. Mayor, etc.* 68

9. Prior to the passage of that act no liability existed, either at common law or by statute, on the part of the city to owners of real estate for injuries occasioned to them by changes of grade in the streets adjoining their premises. *Id.*

10. The said act created no such liability, except in the mode and to the extent prescribed in the act, that is the liability is limited to a claim for the delivery of assessment bonds for the amount of any award made by said board. *Id.*

11. In the case of public improvements, authorized by statute, which provides a mode of compensation to persons injured, that mode is exclusive and no right of action exists in their favor except that directed in the statute. *Id.*

12. Accordingly *held*, that no right of action at law existed against the city to recover damages incidentally occasioned to land by changes in the grade in Eighth avenue. *Id.*

13. Also *held* that an equitable action was not maintainable to vacate an award and assessment made by said board, by reason of alleged fraud on the part of the assessors in making it, as the party aggrieved had a sufficient remedy at law. *Id.*

14. By the judgment in an action for the foreclosure of a mortgage upon premises in the city of New York owned by G., plaintiff's intestate, the referee appointed to sell was directed to pay all assessments on the mortgaged premises out of the proceeds of sale. At the time of the sale there was an assessment on the premises for a local improvement, which the referee paid. This assessment was, on the application of G., subsequently vacated. In an action brought to recover back the amount paid, *held*, that although the assessment was paid without the knowledge of G., yet as it was paid by order of the court, out of moneys belonging to him, and the

court had power to direct the payment so long as the assessment was not vacated, and as its validity could not be determined in the foreclosure suit, the payment was equivalent to a collection from G. under process of law, and he was entitled to recover; also that it was not necessary, as a condition of recovery, to have the foreclosure judgment set aside or annulled, it was not the adjudication which created the apparent lien, or the authority upon which the right of the city, as between it and the property owner, to collect the assessment, depended. *Brehm v. Mayor, etc.* 186.

15. The order vacating the assessment was granted December 4, 1871. Plaintiff presented his claim to the comptroller November 17, 1877, pursuant to the requirements of the city charter (§ 105, chap. 385, Laws of 1873) and this action was commenced December 18, 1877. The statute of limitations was pleaded as a defense, but the complaint was dismissed upon the trial wholly upon other grounds. *Held*, that the statute could not be invoked to sustain the dismissal, as, if error was committed in the ruling, it could not be cured by raising a question on appeal not raised on the trial; also, *held*, that the claim was not barred by the statute, that as by the Code of Civil Procedure (§ 406), "when the commencement of an action has been stayed * * * by statutory prohibition, the time of the continuance of the stay is not a part of the time limited for the commencement of the action," and as by the city charter (§ 105), plaintiff was prohibited from bringing suit until after the lapse of thirty days from the presentation of the claim, the running of the statute was suspended during the thirty days. *Id.*

16. Also, *held*, that the question was not affected by the provision of said Code (§ 410), which declares that when a demand is necessary to entitle a party to maintain an action, the time within which the action must be commenced must be computed from the time when

the right to make the demand is complete; that this provision only applies where an immediate right of action follows a demand. *Id.*

17. *It seems*, the presentation of the claim, although a necessary preliminary to the bringing of a suit against the city, is not the commencement of an action or proceedings to collect the claim within the meaning of the statute of limitations. *Id.*

18. The office of commissioners of excise, is within the purview of the act "to center responsibility in the municipal government of the city of New York" (Chap. 43, Laws of 1884); and where an appointment to that office was made by the mayor after said act went into effect (January 1, 1885) *Held*, that a confirmation by the common council was not required to entitle the appointee to the office. *People ex rel. Haughton v. Andrews.* 570.

19. The object of plaintiff's incorporation, as expressed in its constitution, made pursuant to its charter (chap. 232, Laws of 1838), is "to provide and maintain a place of refuge for colored orphans where they shall be boarded and suitably educated." Plaintiff purchased certain real estate in the city of New York, which with the buildings thereon is used for the purpose of its incorporation. By the "House Rules" religious services are required to be held once a day each Sunday and on certain other days specified, but no visitors are allowed to be admitted on Sunday except under pressing circumstances, and with the consent of the superintendent. In an action to have certain taxes imposed upon the land declared void; *held*, that the building upon the land in question was not a "school-house," "an incorporated academy or other seminary of learning," or a "building for public worship," within the meaning of the provision of the Revised Statutes in reference to exemptions from taxation (1 R. S. 388, § 4, subd. 3), at least as limited by the provisions of

the statute in relation to such exemption in the city of New York (Chap. 282, Laws of 1852; § 827, chap. 410, Laws of 1882), but that it was an "alms-house" within said provision of the Revised Statutes (§ 4, subd. 4, as amended by chap. 186, Laws of 1866), and as such it and the land were exempt from taxation. *Ass'n C. O. v. Mayor, etc.* 581

20. Plaintiff took title to the premises by deed dated July 31, 1877, *held*, that as by the general scheme of taxation applicable to said city (now incorporated in chap. 410, Laws of 1882, §§ 814 *et seq.*), the character of real estate for the purposes of taxation is fixed for the year on May 1, and if then assessable it remains so, and there is no power lodged anywhere to take it out of the record book or the roll for that year, the tax was properly laid, and was payable by the plaintiff if it desired to clear its title; and this, without regard to the question as to whether the tax had become a lien when plaintiff took title. *Id.*

*See COURT OF COMMON PLEAS
(NEW YORK CITY).*

NOTICE.

1. The mere record of a deed from the purchaser at an invalid tax sale, is not notice to the comptroller of the right of the grantee to have the purchase-money refunded to him. *People ex rel. Millard v. Chapin.* 96
2. To charge a city corporation with negligence, in not removing an obstruction unlawfully placed in one of its streets by a third person, it is not necessary to show express notice; if it appears from the circumstances that the municipal authorities charged with the care of its public streets ought to have known of the obstruction and to have caused its removal, and, if ignorant, that their ignorance resulted from the omission of the duty of inspection, and of the degree of diligence which might

reasonably be expected, the city is equally chargeable as if express notice had been actually given. *Kune v. City of Troy.* 844

3. *It seems* that where the question of negligence in not removing such an obstruction depends upon implied notice, in determining what is a reasonable time from which notice is to be inferred, weight should be given to the consideration that municipal authorities cannot be expected to act with the promptness and celerity of individuals in conducting their private affairs. *Id.*

OFFICE AND OFFICER.

1. In an action in the nature of a *quo warranto* to determine the title to the office of chamberlain in the city of Troy, it appeared that by the city charter the mayor has authority, in case of a vacancy in said office, to nominate for a full term of three years, and also, in case of the absence of the incumbent to appoint for a temporary period. In February, 1884, the mayor addressed a communication to the common council, which recited that C., the then incumbent of the office, whose term expired October 7, 1884, "had abandoned his office, and according to accounts had left the city" a defaulter, and appointed defendant "to discharge the duties of the office" during the absence of C. The relator was appointed and confirmed as chamberlain in May, 1885, "for the ensuing term of three years." *Held*, that the appointment of defendant was intended merely as a temporary one, and if the mayor had no power to make such an appointment it was a nullity and did not enure as an appointment for a full term. *People ex rel. Bridgeman v. Hall.* 170
2. In February, 1885, another action in the nature of a *quo warranto* was brought on the relation of the present relator against defendant. The relator then claimed under a nomination and appoint-

ment made January 15, 1885; defendant claimed under the same appointment upon which he bases his claim in this action. Judgment was rendered in that action in June, 1885, against the relator and in favor of defendant, but it was declared therein that it was not decided or intended to be decided whether defendant was legally chamberlain under a temporary appointment or under one for a full term, and the relator was defeated on the ground that he had failed to give a proper bond. *Held*, that said judgment, while it necessarily determined that defendant's appointment was valid, was not conclusive that it was for a full term, and so the judgment did not constitute an estoppel. *Id.*

3. The office of commissioners of excise is within the purview of the act "to center responsibility in the municipal government of the city of New York" (Chap. 43, Laws of 1884), and where an appointment to that office was made by the mayor after said act went into effect (January 1, 1885). *Held*, that a confirmation by the common council was not required to entitle the appointee to the office. *People ex rel. Haughton v. Andrews.* 570

PARTIES.

1. The provision of the act of 1855, "in relation to the collection of taxes on lands of non-residents" (§ 83, chap. 427, Laws of 1855), which authorizes the State comptroller where he shall discover that a sale of land for taxes was invalid or ineffectual to give title to the lands sold, to cancel the sale and refund the purchase-money, was intended to relieve the purchaser from the consequences of a defective tax title; the owner of the land is not properly a party to the proceedings; nor is he permitted in this way to test the validity of the sale. *People ex rel. Wright v. Chapin.* 369
2. Where, therefore, the owner of lands sold for taxes presented his

petition to the comptroller, asking that the sale be canceled in pursuance of the authority conferred upon the comptroller by said act, and that officer denied the prayer of the petition. *Held*, that no right of the petitioner was finally determined, nor was he a person aggrieved by the decision, within the meaning of the provisions of the Code of Civil Procedure (§§ 2122, 2127), regulating the review by certiorari of the determination of a body or officer; and so, that he had no right to a review of the determination of the comptroller. *Id.*

8. Where a complaint shows a cause of action in favor of the plaintiff, not in a representative but in his individual capacity, the addition of the words "executor," etc., in the title, and a statement in the complaint, that he is executor of the will of a deceased person named, do not prevent a recovery by him individually; the descriptive words may be rejected. *Litchfield v. Flint.* 543
4. So, also, words added to the name of the payee in a promissory note, showing that he is executor are mere *descriptio personae*, and an action may be maintained thereon by the payee in his individual capacity. *Id.*

PAYMENT.

1. In an action to recover for services alleged to have been rendered to defendant's testator, after proof of the rendition of the services, plaintiff, as witness in his own behalf, was asked if he had been paid therefor, this was objected to as involving a personal transaction with the deceased. The objection was overruled and plaintiff answered "No." Defendants offered no evidence tending to show payment. *Held*, that while the objection was good the evidence was wholly immaterial and could have done no harm, as payment was an affirmative defense, and the burden of proving it was upon the defendant. *Lercho v. Brasher.* 157

PENAL CODE.

§ 284. <i>People v. Johnson.</i>	218
§ 505. <i>People v. Meegan.</i>	529
§ 558. <i>People v. Wightman.</i>	598

PENALTIES.

1. As the rights and liabilities under the penal provisions of the General Manufacturing Act (Chap. 40, Laws of 1848), are not only "regulated by special provision of law," but have no existence outside of the statute, the right of transfer given by the Code of Civil Procedure (§ 1910), does not under said Code give a right of enforcement to the transferee (§ 1909), but leaves the question of that right to the existing law. *Blake v. Griswold.* 618
2. The rule of the common law governs the question as to the survivability of a cause of action, to recover the penalty imposed by said act upon a trustee of a corporation organized under it, who has joined in making a false annual report, it is not affected by any provision of the Code, and the action abates upon the death of either party. *Id.*

PHYSICIANS AND SURGEONS.

Where the statutory prohibition (Code of Civ. Pro., § 884) against the disclosure by a physician of information acquired by him while attending a patient in his professional capacity has been expressly waived by the patient, and the waiver acted upon, it cannot be recalled; the information is then open to the consideration of the entire public, and the patient is not privileged to forbid its repetition. *McKinney v. Gd. St., etc., R. R. Co.* 353

PLEADING.

1. Where a complaint shows a cause of action in favor of the plaintiff, not in a representative, but in his

individual capacity, the addition of the words "executor," etc., in the title, and a statement in the complaint, that he is executor of the will of a deceased person named, do not prevent a recovery by him individually; the descriptive words may be rejected. *Litchfield v. Flint.* 543

2. Plaintiff's complaint alleged his appointment as executor of the will of H., the execution to him by the K. C. R. R. Co. of a promissory note, a copy of which was set forth in the complaint, which was made payable to him or order, he being described as executor of H.; the transfer and delivery of the note to F., who held the same at the time of the making of an agreement between plaintiff and defendant; in pursuance of which agreement plaintiff transferred and assigned to defendant certain stock and bonds of the company and claims against it. In consideration whereof defendant, by the said agreement, promised, among other things, that when his interest in the road and in the securities was closed up he would apply the proceeds, with the consent of the company, to the payment of the note, provided F. would relinquish certain bonds of the company. The complaint further alleged that said agreement was entered into by plaintiff individually, for the purpose of making certain provision for the payment of the note; that the note and the bonds referred to were thereafter assigned to him by F.; that when the note became due payment was demanded and refused; it was duly protested and notice of nonpayment served upon plaintiff; that the interest specified in the agreement had been closed up, and defendant had received on account of the property, over and above all advances and expenditures, a sum more than sufficient to pay said note; that the consent of the company to such payment had been obtained, and that a tender of the bonds was made, with the demand of payment, but that defendant refused to pay. On demurrer to the complaint; *held*, that it set forth a

good cause of action; that if plaintiff simply occupied the position of assignee from F., the promise of defendant became available to, and could have been enforced by F.; and by the transfer of the note to plaintiff he acquired that right; that even if this were not so, plaintiff, having become possessed of the note, could enforce the promise to pay it, not simply as assignee of F., but as a party to the agreement.

Id.

PLEDGE.

Where the mortgage of a third person has been assigned by the mortgagee as collateral for his own debt, the foreclosure of the mortgage and purchase at the foreclosure sale by the assignee, as against the assignor, where the latter is not made a party to the foreclosure and his equitable right foreclosed, simply substitutes the land for the mortgage and the assignee holds it as a security merely, subject to the right of the assignor to redeem by payment of the debt, and upon such payment he is entitled to the land. *In re Gilbert.* 200

POWERS.

The will of S., who died leaving both real and personal estate, after providing for the payment of his debts and giving certain specific legacies, gave his residuary estate to his executors to sell and dispose of the same and divide the proceeds equally between his "wife and children, share and share alike." *Held*, that the widow was not put to her election, but was entitled to dower in addition to the provision made for her in the will; that the devise to the executors was void as a trust, but valid as a power in trust, and the lands descended to the heirs, subject to the execution of the power; and that the execution of such power was not inconsistent with a dower interest, but a sale would be subject thereto. *Konovalinka v. Schlegel.* 125

— Where provision in will authorizing executors to mortgage real estate, if valid, only so as a power.

See Weeks v. Cornwall.

325

POWER OF ATTORNEY.

A transcript certified to by the proper officer, of a power of attorney authorizing the conveyance of land, recorded in the clerk's office of county in which the land is situated, is competent as evidence (1 R. S., 763, § 39; Code of Civ. Pro., § 933). *Lorche v. Brasher.* 157

PRACTICE.

1. A party who has permitted the reception of improper evidence without properly objecting thereto may not thereafter object to the same, and has not a legal right to have the same stricken out. *In re Morgan.* 74
2. An objection made before a question is put calling for the evidence objected to, where there has been no offer of evidence, is premature, and so not available. *Id.*
3. Exceptions herein were ordered to be heard at first instance at General Term, and upon argument there an order was made denying motion for new trial, overruling the exceptions and directing judgment on the verdict. Defendant appealed from the order and from the judgment entered thereon. Plaintiffs claimed the order was not appealable, and that the appeal from the judgment brought up nothing for review but the question whether the judgment was in accordance with the order, as there was no statement in the notice of appeal that the appellant intended to bring up for review an intermediate order as required by the Code of Civil Procedure (§§ 1301, 1316). *Held*, that the order was not an intermediate order, within the meaning of the Code, and that while the appeal therefrom was useless, yet as it was taken in connection

with the appeal from the judgment, it was not necessary to dismiss it, as the latter brought up all the exceptions for review. *Becker v. Koch.* 894

4. It seems, that until substitution of the personal representatives of a deceased plaintiff in his place an appeal from a judgment may not be heard. *Blake v. Griswold.* 618

5. Where, however, an appeal to this court in such case was heard without knowledge of the death and the judgment was affirmed. *Held*, that on granting a motion for substitution the court could affirm the judgment in favor of the substituted representative. *Id.*

6. An appeal may not be taken to this court from an order of General Term affirming a judgment; so, also, where there is both an appeal to the General Term from a judgment and from an order denying a motion for a new trial, and the judgment and order are affirmed, an appeal is not authorized from so much of the order as affirms the order denying a new trial. Such an appeal brings no question before this court not involved in an appeal from a judgment entered on the General Term order. Judgment should first be entered on such order and an appeal taken from that. *Derleth v. De Graff.* 661

7. This court has no jurisdiction to compel an appellant to attach to the return copies of documents which were not part of the record in the court below. *States v. Cromwell.* 664

8. If the documents should for any reason be made part of the record a motion for that purpose should be made in the court below. *Id.*

— *Where motion for retaxation of costs was granted, with directions to the clerk to tax in addition a trial fee and ten dollars additional because trial occupied more than two days, and the papers on which motion was made were not included in return, but instead a mere memorandum containing an extract from and of the costs as*

taxed, with stipulation of the attorney that it was assessed to "as and for papers on appeal." Held, that nothing appeared to make the appellant's objection intelligible.

See Oreskull v. Mullin (Mem.) 660.

— *When order of reversal in criminal action stated it was made on questions of law, but did not state that the court had considered the question of fact. Held, that the order was not reviewable, as the defendant was entitled to a review of the facts, and the exercise of the discretionary power of the court in granting a new trial thereon. Case remitted to the General Term to consider those questions.*

See People v. Stevens (Mem.) 667

PRINCIPAL AND AGENT.

In an action by executors or administrators against the maker of a note or the drawer of a check, executed for defendant by his agent, where the defense is payment, the agent is not precluded from testifying on behalf of his principal to personal transactions and communications with the decedent showing payment by the agent; he is not "interested in the event" within the meaning of the Code of Civil Procedure (§ 829). *Nearpass v. Gilman.* 506

— *Where estate of agent who had moneys placed in his hands for investment and reinvestment, but who mingled the same with his own funds, is properly chargeable with compound interest.*

See In re Kernochan. 618

PRINCIPAL AND SURETY.

1. One who purchases land, subject to a mortgage, makes the land thereby the primary fund for the payment of the mortgage debt, and this is so, although the deed contains a covenant on the part of the grantee to pay the mortgage debt. The covenant is to indemnify the grantor against the contingency that the land may not bring enough to pay such debt. *In re Warren v. Wilbur.* 193

2. W. purchased certain real estate, subject to a mortgage thereon, which by his deed he assumed and agreed to pay. He conveyed the land to his daughter by deed containing full covenants, in which no reference was made to the mortgage. The only consideration for the deed was natural love and affection. W., after the conveyance, paid part of the mortgage. The daughter, after his death, paid interest on the balance and for the amount so paid presented a claim against his estate. *Held*, that the land was the primary fund for the payment of the mortgage, and the daughter took it subject to that burden; that the covenants in the deed were invalid and W. incurred no obligation, legal or equitable, to pay the mortgage in exoneration of the land; and that, therefore, the claim was improperly allowed. *Id.*

- 3 F & W., who were copartners, executed two mortgages, one to secure a bond executed by F., the other a bond executed by both. Each of the bonds was given for partnership indebtedness. The mortgages covered certain lands owned by F. & W. jointly, also lands owned by F. alone. F. & W. subsequently conveyed the mortgaged lands owned by them, by full covenant deed, for a price that covered the full value of the unincumbered fee. F. died, and thereafter plaintiff, the administratrix of the mortgagee, negotiated a settlement of various claims the estate held against W., and plaintiff executed to W. a release and discharge, among other things, of all several and joint liability on account of the bonds and mortgages, which release recited that it was not intended "to affect or discharge the liability" of F. "or intended to affect any other security for any of said demands other than the personal liability of" W. In an action to foreclose the mortgages, *held*, that the release discharged the party primarily liable for the mortgage debt, and so cut off and destroyed the equitable right of subrogation belonging to the surety in case of payment, and, therefore, that the

lien of the mortgages upon the lands bound as security was discharged. *Murray v. Fox.* 382

PRIVILEGED COMMUNICATIONS.

1. Where the statutory prohibition (Code of Civ. Pro., § 834) against the disclosure by a physician of information acquired by him while attending a patient in his professional capacity, has been expressly waived by the patient, and the waiver acted upon, it cannot be recalled; the information is then open to the consideration of the entire public, and the patient is not privileged to forbid its repetition. *McKinney v. Grand St., etc., R. R. Co.* 352
2. Accordingly, *held*, where upon the trial of an action against a railroad corporation, to recover damages for injuries to plaintiff caused by negligence, a physician, who, as such, attended upon the plaintiff after the injury, was called as a witness in her behalf, and testified as to all the facts bearing upon her physical condition, learned by him while so attending upon her, that upon a subsequent trial the defendant was entitled to call and examine him as a witness in regard to such facts. *Id.*

PROMISSORY NOTES.

See BILLS, NOTES AND CHECKS.

PUBLIC LANDS.

— *As to right of commissioners of town of Gravesend to lease or sell the town lands on Coney Island.*

See *Tilyou v. Town of Gravesend.*

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See *Furey v. Town of Gravesend.*

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QUESTIONS OF LAW AND FACT.

Where the terms and language of a contract are ascertained, in the

absence of technical phrases, or of terms, the meaning of which is obscure, or of latent ambiguities, rendering the subject-matter of the contract uncertain and doubtful, the office of interpreting its meaning belongs to the court. *Brady v. Cassidy.* 147

— *Where evidence as to contributory negligence insufficient to justify nonsuit.*

See Sherry v. N. Y. C. & H. R. R. Co. (Mem.) 652

QUO WARRANTO.

— *Action in nature of.*

See People ex rel. Bridgeman v. Hall. 170

RAILROAD CORPORATIONS.

1. The act of 1875, known as the "Rapid Transit Act" (Chap. 606, Laws of 1875), prior to the passage of the "General Surface Act" (Chap. 252, Laws of 1884), authorized the formation of companies to construct street railways on the surface, to be operated by any power other than animal. (EARL, J., dissenting.) *N. Y. Cable Co. v. Mayor, etc.* 1

2. The "General Surface Act" was not intended to, and does not interfere with the rights of any street surface railroad company organized before its passage under the "Rapid Transit Act;" it only prohibits the construction of surface roads by corporations thereafter organized. The saving clause in the "General Surface Act" protects, not only consummated and perfected rights of a company theretofore organized, but such rights as the company had, although inchoate and subject to the performance of further conditions; and by the subsequent performance of the conditions those rights are perfected. (EARL, J., dissenting.) *Id.*

3. As, however, the "Rapid Transit Act" prescribes the proceedings by which rights may be

acquired, a substantial compliance with the material requirements of the act is a condition precedent, without performance of which a company never became legally incorporated or acquired any rights under the act. *Id.*

4. The intent of the provision of the "Rapid Transit Act" (§ 6), requiring the commissioners appointed by the mayor of a city to fix and determine the time within which the proposed railway or railways, or portions thereof shall be constructed, is to limit the corporation in respect only to time during which it is possible for it to prosecute the work, excluding time when legal barriers exist to such prosecution. *Id.*

5. Where, therefore, the commissioners appointed by the mayor of New York specified a time within which each of twenty-nine different routes located by them should be completed, but provided that the time should begin to run from the date of the obtaining the requisite consent of property owners and of the local authorities, or, in case of failure to procure such consent, from the date of the confirmation of the report of commissioners appointed by the court; and also provided that the time unavoidably consumed by the pendency of legal proceedings or the interference of public authorities, or the omission to open or grade shall not be deemed a part of the time limited. *Held*, that this was a substantial compliance with the act. *Id.*

6. The articles of association framed by the mayor's commissioners, instead of providing, as required by said act (§ 7), for the release and forfeiture to the supervisors of the county of all the rights and franchises acquired by the corporation, in case the proposed railways were not completed in time, provided, that in case the several portions of such railways were not completed each within the time limited, the rights and franchises "for and as to any portion of such railway or railways

not so completed," shall be released and forfeited. *Held*, that this was a material departure from the requirements of the act; that the provision should have been for the release and forfeiture of all the rights and privileges; that the provision was an attempt to override the action of the Legislature in refusing to make the amendment to the "Rapid Transit Act" of 1883 (§ 2, Chap. 893, Laws of 1883), applicable to the city of New York, by incorporating the substance of the amendment in the articles of association. *Id.*

7. Also, *held*, that as there was no general law, declaring a forfeiture or requiring a release to the supervisors, a compliance with the provision was necessary to carry out the legislative intent, and the failure to comply was a fatal defect in the articles. *Id.*

8. Under the provision of the Rapid Transit Act (§ 5), requiring the mayor's commissioners to fix the plan or plans for the construction of the railway or railways, it is, at least, essential that they shall determine whether the contemplated road shall be an underground, overground or surface road, and a failure on their part to determine this question is a failure to comply with one of the conditions precedent to the acquisition of corporate power. *Id.*

9. By the resolutions of the commissioners, incorporated in the articles of association, as to several of the routes laid out, it was left to the subsequent election of the company whether they should be surface or elevated roads. As to other routes, where the articles provided for elevated roads, with a double track, authority was given to the company to add such other tracks as might, from time to time, be needed to accommodate increasing traffic and to make such additions to the structures as might be needed. It was, also, left to the company to determine as to the method of supporting the tracks, *i. e.*, whether they should be carried on longitudinal girders resting on the top of columns or

by transverse girders supported by columns. The power to erect stations and platforms was not restricted or defined, but it was left to the company to decide where they were necessary; it was authorized to occupy so much of the sidewalk for stairways and approaches "as may be necessary," and also to construct "such supports, turn outs * * * stations, buildings, platforms, stairways * * * and such other requisite appliances as shall be proper." *Held*, that the commissioners failed to substantially comply with the act, and that as such compliance was essential there was no valid organization of the petitioner. *Id.*

10. At common law a carrier of passengers and freight is under no obligation to provide depots for passengers awaiting transportation or warehouses for freight. *People v. N. Y., L. E. & W. R. R. Co.* 58

11. No such obligation is imposed by the General Railroad Act of this State (chap. 140 Laws of 1850) or the various amendments thereof, upon railroad corporations organized under it. *Id.*

12. The obligation may not be implied from the fact that such corporations are executing a public trust, and authorized by the act to "erect and maintain all necessary and convenient buildings, stations * * * for the accommodation and use of their passengers, freights and business." (§ 28, subd. 8.) The exercise of this power is in the discretion of the corporation, and with the exercise of that discretion the legislature alone can interfere. *Id.*

13. *It seems* the legislature has power to impose such an obligation. *Id.*

14. The railroad commission, organized under and in pursuance of the act of 1883 (chap. 853, Laws of 1883) has judicial power to hear and determine, upon notice, questions arising between the people and a railroad corporation, but no power is given to it, or to any

- court, to enforce the decision, and its proceedings and determinations amount to nothing more than an inquest for information. The attorney-general is given no new power in the matter, and the corporation may continue the management of its business in its own way, without regard to the judgment of the commissioners. *Id.*
15. Accordingly, *held*, that the Supreme Court had no jurisdiction to grant a writ of *mandamus* on behalf of the people at the instance of the attorney-general, requiring a railroad corporation to erect a building at a station on its road of sufficient capacity to accommodate the passengers and freight business at that place, although it appeared, and was conceded by the corporation, that its station building was entirely inadequate for these purposes, and that the absence of a suitable depot building and warehouse was a serious injury to the public doing business at that station, and although it appeared that upon a complaint made to the railroad commissioners, and, upon notice to the defendant, that body adjudged and recommended that the company should construct a suitable building within a time named, with which it refused to comply, not for want of means, but because its directors decided not to do so. *Id.*
 16. In an action by an owner of real estate, abutting on a street in the city of New York, against a corporation operating an elevated railroad constructed over said street, to recover damages to his property occasioned thereby. *Held*, that the doctrine of the case of *Story v. New York Elevated Railroad Company* (90 N. Y., 122), although pronounced by a divided court, must be considered as *stare decisis* upon all questions involved therein, not only questions which it expressly decides, but such as logically come within the principles therein determined. *Lahr v. Met. El. R. R. Co.* 268
 17. The questions so determined stated as follows: *Id.*
 18. Abutters upon public streets in a city are entitled to such damages as they may have sustained by reason of a diversion of the street from the use for which it was originally taken, and its illegal appropriation to other and inconsistent uses. *Id.*
 19. An elevated railroad in a street of a city, supported by columns placed along the outer line of the sidewalks, and operated by steam power, is a perversion of the use of the street from the purposes originally designed, and is a use which neither the city authorities nor the legislature can legalize or sanction, without providing compensation for the injury inflicted upon the property of abutting owners. *Id.*
 20. Abutters upon a public street of a city, claiming title to their premises by grant from the municipal authorities, which grant contains a covenant that a street to be laid out in front of such property shall continue forever thereafter as a public street, acquire an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air. *Id.*
 21. The ownership of such an easement is an interest in real estate, constituting property within the meaning of that term as used in the Constitution of the State, and requires compensation to be made therefor before it can lawfully be taken for public use. *Id.*
 22. The erection and operation of an elevated railroad as aforesaid in the street, the use of which is intended to be permanent, constitutes a taking and appropriation of the easement by the railroad corporation rendering it liable to the abutters for the damages thereby occasioned. *Id.*
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22. The erection and operation of an elevated railroad as aforesaid in the street, the use of which is intended to be permanent, constitutes a taking and appropriation of the easement by the railroad corporation rendering it liable to the abutters for the damages thereby occasioned. *Id.*
23. Also, *held*, that no legal difference exists with reference to the interest acquired by abutting owners in a public street in the city of New York, between that

created by a grant from the municipality with a covenant as aforesaid, or that acquired through a series of *mesne* conveyances from the original owner whose property was taken *in invitum* by the city, by proceedings under the act of 1818 (3 R. L. 49, § 177), to be held as prescribed by said act, "in trust, nevertheless, that the same be appropriated and kept open for and as a part of a public street * * * forever in like manner as the other public streets * * * in the said city are, or of right ought to be;" that said proceedings not only created a valid trust in the city which would preclude it from any other use of the land acquired than that expressly described in the statute, but also constituted a contract between the city and the owner which runs with the land, and enures to the advantage of each successive grantee thereof.

Id.

24. Also, *held*, that it was not essential to the acquisition of an abutter's rights in the street that any land should have been originally taken from him, as in any event he is a party to the proceedings to appropriate the land for the same and liable to be assessed for its benefits and therefore entitled to enjoy them; that the contract created by the statute and proceedings applies to all persons entitled to be heard, and enures equally to the benefit of all, although they may be unequally assessed for its cost.

Id.

25. Also, *held* (RUGER, Ch. J., ANDREWS and DANFORTH, JJ., concurring), that the railroad corporation was liable for the operation of its trains and the consequences flowing therefrom in respect to the manufacture and distribution in the air of gas, smoke, steam, dust, cinders, ashes and other unwholesome and deleterious substances from its locomotives and trains.

Id.

26. No partial justification of the damages inflicted by an unlawful structure, and its unlawful use can be predicated upon the circumstance that under other conditions,

and through a lawful exercise of authority, some of the consequences complained of might have been produced without rendering their perpetrator liable for damages (RUGER, Ch. J., ANDREWS and DANFORTH, JJ., concurring).

Id.

27. Where the public for a long period of time have notoriously and constantly been in the habit of crossing a railroad at a point not in a traveled, public highway, with the acquiescence of the railroad corporation, this acquiescence amounts to a license, and imposes a duty upon it, as to all persons so crossing, to exercise reasonable care in the running of its trains, so as to protect them from injury. *Byrne v. N. Y. C. etc., R. R. Co.*

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28. Although not absolutely bound to ring a bell or blow a whistle upon the locomotive of a train, approaching such a crossing, the company is bound to give some notice and warning, and as to what is sufficient is a question of fact for a jury.

Id.

29. Where a train is backing toward the crossing, the fact that the bell was rung does not, as matter of law, establish reasonable care; it is for the jury to determine as to whether any other precautions should have been taken upon the train under the circumstances.

Id.

30. Where in an action to recover damages for injuries sustained by a child of tender years, who, when passing along a public street where it crossed a railroad track, was struck by a train, it appeared that the child exercised the degree of care and prudence required of a person *sui juris*, *held*, it was immaterial that the parents of the child, were guilty of negligence in permitting it to be on the streets; and so, the reception of improper evidence offered to excuse such negligence was not a ground for reversal. *Cumming v. B. C. R. Co.*

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31. *It seems*, evidence that the parents

were unable to hire any servant or person to aid the mother in looking after the child, is not competent to rebut proof of negligence on her part. *Id.*

32. In such an action, *held*, that a municipal ordinance, prohibiting railroad companies from stopping their cars at a street intersection, so that they will interfere with travel on the cross streets, was properly received in evidence on the question of defendant's negligence, in connection with evidence that a train had stopped in violation of this ordinance, which prevented the plaintiff from seeing the approaching train. *Id.*

RAPE.

1. Upon the trial of an indictment for rape it is proper to prove by the complainant, after she has testified to the commission of the offense charged, a prior unsuccessful attempt upon her, by the defendant, to commit the same crime. *People v. O'Sullivan*. 481

2. The testimony of the complainant on such a trial was to the effect that the offense was committed upon her by defendant, a Catholic priest, in his house, where she was employed as a servant, on May 6, 1884; that she remained in his service until August twentieth thereafter without disclosing the facts in any manner to any one, although she had full and free communication with her friends. She left defendant's employ not on account of the offense, but because the defendant whipped her for some fault. She went home to her foster-parents and remained with them until September tenth, and then went to work in a situation procured for her, at her request, by defendant, and while living there on March 28, 1885, disclosed for the first time the offense to a Catholic priest at confession. Testimony as to the dis-

closure was received under objection and exception. The only excuse for the delay in making the disclosure given by the complainant was that after the assault upon her she voluntarily went to the defendant's confessional, while living with him, on several occasions, and confessed to him, and on each occasion he asked her if she had told any one, and on her answering in the negative, he said "God bless you, my child." Also, that while she lived with him he told her it was a sin to "tell on a priest," and if she did, she would go to hell or purgatory; that she did not go to confessional afterward until the time when she made the disclosure. *Held*, that testimony as to the disclosure so long after the offense was improperly received. *Id.*

3. A disclosure in a case of rape has no value whatever, unless it is the natural result of the horror and sense of wrong which would prompt any virtuous female to make an outcry at the first suitable opportunity. *Id.*

REARGUMENT.

1. After decision of appeal had from order appointing commissioners in proceedings under the "Rapid Transit Act" (Chap. 606 Laws of 1875), a motion for reargument was made upon papers showing proceedings instituted to amend in the particulars in which the court had held the articles to be defective. *Held*, that, conceding such proceedings were effectual, they would not afford ground for a reargument, as the jurisdiction of this court is confined to a review of the determinations actually made by the Supreme Court, and must be had upon the same papers which were before the General Term. *N. Y. Cable Co. v. Mayor*, etc. 1
2. *It seems* that the order of this court affirming the order of General Term, denying the application of the petitioner will be no

obstacle to a rehearing by the General Term, or to a new application, based upon new facts. *Id.*

RECORDING ACT.

1. The mere record of a deed from the purchaser at an invalid tax sale, is not notice to the comptroller of the right of the grantee to have the purchase-money refunded to him. *People ex rel. Millard v. Chapin.* 96
2. A transcript, certified to by the proper officer, of a power of attorney authorizing the conveyance of land, recorded in the clerk's office of county in which the land is situated, is competent as evidence (1 R. S. 763, § 89; Code of Civ. Pro., § 983). *Lerche v. Brasher.* 157

RELEASE.

1. F. & W., who were copartners, executed two mortgages, one to secure a bond executed by F., the other a bond executed by both. Each of the bonds was given for partnership indebtedness. The mortgages covered certain lands owned by F. & W., jointly, also lands owned by F. alone. F. & W. subsequently conveyed the mortgaged lands owned by them, by full covenant deed, for a price that covered the full value of the unincumbered fee. F. died, and thereafter plaintiff, the administratrix of the mortgagee, negotiated a settlement of various claims the estate held against W., and plaintiff executed to W. a release and discharge, among other things, of all several and joint liability on account of the bonds and mortgages, which release recited that it was not intended "to affect or discharge the liability" of F., "or intended to affect any other security for any of said demands other than the personal liability of" W. In an action to foreclose the mortgages, *held*, that the release discharged the party primarily liable for the mortgage debt, and so cut off and destroyed

the equitable right of subrogation belonging to the surety in case of payment, and, therefore, that the lien of the mortgages upon the lands bound as security was discharged. *Murray v. Fox.* 882

2. Prior to the execution of the release by plaintiff, W. compromised with the said grantee of a portion of the mortgaged premises certain claims, held by it, and received a release of himself and the heirs of F. upon the covenants in the deed, and from all existing debts, matured and unmatured, with a covenant that the releasor had not parted with or impaired its title "to any such debts." *Held*, that the release of the covenants in the deed did not *ipso facto* discharge the equities which might arise in favor of the covenantee against the covenantor, or make the land principal debtor for the mortgage; but that it remained chargeable only as surety, and the right of subrogation remained, which was cut off by plaintiff's release. *Id.*

RIPARIAN OWNERS.

Upon trial, before the board of claims, of a claim for an unlawful diversion by the State of the waters of Seneca river, it appeared that on account of defects in the locks, gates, walls, etc., of the canal more water was diverted from the river than the superintendent of public works, in the exercise of his discretion, required for the use of the canal and more than was necessary for navigation, and that if said structures had been in a condition not to leak, the claimant, a riparian proprietor and mill owner on the river, would have had the use of a portion of the surplus water so diverted. *Held*, that the claimant made out a case which would have created a legal liability as against an individual; and so, that under the act of 1870 (Chap. 321, Laws of 1870), he was entitled to his damages; also, that the State was not the sole judge of the necessity and of the amount

to be taken, but it was incumbent upon it to prevent leakage or other wastage to a more than fair and reasonable extent; and that a finding of negligence on the part of any officer of the State was not necessary. *Silby Mfg Co. v. State.* 562

SALES.

Plaintiffs, whose testator had carried on a manufacturing business, sold to defendants the "plant," and leased to them the buildings in which the business had been carried on, and after the lessees had taken possession, sold and executed to them a bill of sale of "the entire manufactured stock, * * * now on hand at foundry and store-rooms," which were part of the premises so leased. Plaintiffs immediately began an inventory of the property, which when completed was delivered to defendants. A large amount, consisting proportionally of the more valuable part of the goods which had appeared in and was exhibited as part of the stock at the time of the sale, was omitted from the inventory, and it appeared had been delivered by plaintiffs to other parties, after the day of sale, upon orders received by them previous to that time, but as to which there had been no valid agreement of sale. In an action to recover the contract-price for the goods delivered, defendants set up as a counter-claim damages for the removal of the said goods. The court on the trial left it to the jury to determine what the parties meant by the "stock on hand" in the bill of sale, and charged that there was some part of the stock plaintiffs did not own at the time of the sale. *Held*, error; that as plaintiffs failed to show a contract, which, as between themselves and the alleged purchasers of the goods so taken from the stock, transferred the title of the property, plaintiffs remained the legal owners and entitled to dispose of it to defendants; and, as the property was on the premises occupied by defendants, the execution of the

bill of sale passed the title to them; that assuming a valid executory contract of sale had been made by plaintiffs prior to the sale to defendants, the purchaser acquired no title to any specific property, and on the refusal of the vendors to fill the orders had simply a right of action for damages; and that it was the undoubted right of defendants to have the meaning and intent of their contract determined by the court. *Brady v. Cassidy.* 147

2. While the delivery of personal property to the vendee under an executory contract of sale is an important and controlling fact on the question as to change of title, it is not conclusive; if the delivery is simply to meet some term of the contract not inconsistent with the retention of title by the vendor, it will not pass the title contrary to the intention. *Cornell v. Clark.* 451
3. So where anything remains to be done to ascertain and identify the subject of sale the title does not pass. *Id.*
4. A railroad corporation entered into a contract with M., by which the latter agreed to deliver to the former, at certain specified points on the company's lands, twenty thousand ties, at fifty-five cents each for first-class ties, and thirty-five cents "for what shall be adjudged second-class ties," to be inspected and counted by a person named. The company agreed to advance fifteen cents apiece for ties as they were delivered, "the remainder to be paid on or about the time the ties are taken and used." M. delivered a quantity of ties, which were counted, and the company paid the advance agreed upon. The ties were never inspected or divided into classes. The company became insolvent, and its property and franchises were sold on foreclosure. In an action wherein the question was as to the title to the ties, *held*, that the title did not pass to the company by the delivery; that it was not bound to take all the ties, but only such as should be adjudged

first and second-class, the inspector having power to reject unmerchantable ties, and so, it could not be known until inspection and separation were made what part of the ties were to be taken. *Id.*

5. Plaintiff, who was a director of the company, purchased the ties of M., paying individually the price agreed upon. The company had discontinued its operations and there was no evidence that plaintiff was acting as its agent in the purchase. He removed the ties after the purchase. Defendant, as sheriff, levied upon them by virtue of an execution against the company. *Held*, that, assuming plaintiff was disabled, as against the company, from purchasing on his own account, the legal title was vested in him by the purchase; and, as the company had not claimed the benefit thereof, which it could only do by reimbursing the price paid, that the property could not be taken from his possession by execution against it, and defendant was not in a position to question plaintiff's title. *Id.*

SARATOGA SPRINGS (VILLAGE OF).

1. Snow and ice which had fallen from time to time from a barn adjoining the sidewalk on one of defendant's streets, had accumulated on the sidewalk to the height of about three feet above the surface, and about two and a half feet above the snow on the rest of the sidewalk. This accumulation had been there about two weeks when plaintiff, in passing over it, fell and was injured. By defendant's charter (Chap. 220, Laws of 1866) the care and custody of its streets are imposed upon its trustees, and it is made their duty to establish such ordinances and regulations as they may think proper, among other things, to provide for and regulate the repairing and cleaning of streets and sidewalks, and power is given to raise money to discharge these duties. In an action to recover damages, *held*,

that defendant was properly charged with negligence. *Pomfroy v. Village of Saratoga Springs.* 459

2. It appeared that the street in question, with its sidewalks, had been open for its full width for about forty years it was a principal street of the village and extensively used. Water mains were laid through it, and curb-stones had been placed along the sidewalks at the expense of the village. *Held*, the evidence justified a finding that the street, for its whole width, had been dedicated to and accepted by the public, and that it was legally one of the village streets. *Id.*
3. By defendant's charter, after provisions had been made for repairs of its streets and sidewalks, for the purpose of providing the means for defraying expenses, the board of trustees was authorized to raise annually a sum not exceeding an amount specified "for the support of roads * * * streets, lanes and alleys within the village." *Held*, that the word "streets" included the whole space between the outer lines thereof, *i. e.*, not only the roadway but the sidewalks; and that the money raised could be used as well for the repair of the sidewalks as the roadbed. *Id.*
4. The village superintendent whose duty it was, under the direction of the trustees to make repairs, testified that he did not have any money in his hands for that purpose; there was no proof that there were not sufficient funds in the treasury of the village, which under the charter could have been placed in his hands. *Held*, the evidence failed to show want of funds to repair the sidewalk. *Id.*
5. Also *held*, that plaintiff's claim was not of the character required by the act of 1875 (§ 2, chap. 517, Laws of 1875) to be presented to and audited by the auditors of the village. *Id.*
6. Upon the trial plaintiff offered in evidence an ordinance of the

village, which imposed penalties upon persons who should throw snow or ice from roofs upon sidewalks, or who should neglect to keep sidewalks in front of their lots and buildings clear of snow and ice; this was received under objection and exception. *Held*, no error. *Id.*

7. A witness called for the plaintiff, after she had testified as to the condition of the sidewalk, and that a person had to be very careful, or fall, as she knew from experience, was permitted to testify, under objection, that she fell down in the same place. *Held*, no error. *Id.*

8. The evidence tended to show that this embankment of snow and ice was perfectly visible; there was a light covering of recent snow over the ice. *Held*, a refusal of the court to charge, as matter of law, that it was negligence for plaintiff, under the circumstances, to attempt to pass over the embankment was not error. *Id.*

SAVINGS BANKS.

Under the general act regulating the dealings and operations of savings banks (§§ 27, 28, chap. 371, Laws of 1875), the fact that a savings bank secures an agreement to pay interest from the bank with which it makes a deposit authorized by said act, does not convert the deposit into an unauthorized loan. *Erie Co. Sgs. Bk. v. Coit.* 533

SEDUCTION.

— *When indictment for, may be amended.*

See People v. Johnson. 213

SERVICE (AND PROOF OF).

Defendant, a corporation created under the laws of, and doing business in, another State, sold to plaintiffs, who were doing busi-

ness in this State, certain agricultural implements, with an agreement to indemnify and defend them from all prosecutions because of any alleged infringement of any patent in selling the implements, provided notice was given to it, and it was allowed to take charge of the case. An action having been so commenced against plaintiffs they notified defendant and required it to take charge of the defense; this it did not do, and judgment was rendered against plaintiffs in that action. The summons in an action upon the guaranty was served in this State upon a director of the defendant. On motion to set aside the service, *held*, that the cause of action arose in this State and the summons was properly served (Code of Civ. Proc., § 432, subd. 3); also *held*, that for the purposes of the motion the records of defendant showing the election of the person upon whom service was made as a director, was sufficient to establish that he was one in fact. *Childs v. Harris Mfg. Co.* 477

SET-OFF.

The allowance as an equitable off-set, to reduce a demand in suit of an item, which cannot be allowed as a legal off-set or counter-claim, is only proper where the equity invoked is entirely clear and certain, where other remedies are impossible, and where the demand allowed is put beyond reasonable doubt. *Armstrong v. McKelvey.* 179

SPECIFIC PERFORMANCE.

In an action to compel the specific performance, on the part of the vendee, of a contract for the sale of lands, plaintiff claimed title under a deed from an assignee in bankruptcy. It appeared that in 1843 the then owner of the land was adjudged a bankrupt, and the official general assignee in bankruptcy became vested with the title; no debts were proved against

the estate of the bankrupt before his discharge, and but one small one thereafter. In 1844 the assignee advertised and sold the land at auction, and it was bid off by one R. for \$3. In 1866, T. claiming to have purchased the bid of R. from his administratrix, applied for and obtained a deed from the assignee which was recorded in 1869. No possession accompanied the title under the assignee's sale. *Held*, that the title was defective and defendant could not be compelled to complete the purchase; that if there was a binding contract for the sale of the land by the assignee to R., the administratrix of the latter had no interest in the land, as the interest of her intestate was real estate and went to his heirs; and that, therefore, she conveyed no right or interest by her assignment, and the assignee in bankruptcy had no authority to convey to T. *Palmer v. Morrison.* 132

STATE.

1. Where the State claimed title to lumber cut from land bid in for it at a tax sale, *held*, that proof of the comptroller's deed, having as against the State shown that it had once parted with its original property therein, and assumed to sell the land as that of a citizen for taxes, it was precluded from claiming that its original proprietorship still remained. *People v. Hagadorn.* 516
2. The act of 1813, incorporating the S. L. N. Co. (Chap. 144, Laws of 1813), gave to that corporation the right to use only so much of the waters of Seneca river, for the purposes of navigation on its canal, and forbade its use by it for any other purpose. *Silsby Mfg. Co. v. State.* 562
3. The State having acquired, under the act of 1825 (Chap. 271, Laws of 1825), "the stock, property and privileges belonging or appertaining to" said company, and only that, has no authority to use any more of the waters of said river than are necessary for the pur-

poses of navigation, and has the right to use them only for that purpose. *Id.*

4. Upon trial, before the board of claims, of a claim for an unlawful diversion by the State of the waters of said river, it appeared that on account of defects in the locks, gates, walls, etc., of said canal, more water was diverted from the river than the superintendent of public works, in the exercise of his discretion, required for the use of the canal and more than was necessary for navigation, and that if said structures had been in a condition not to leak, the claimant, a riparian proprietor and mill owner on the river, would have had the use of a portion of the surplus water so diverted. *Held*, that the claimant made out a case which would have created a legal liability as against an individual; and so, that under the act of 1870 (Chap. 831, Laws 1870), he was entitled to his damages; also, that the State was not the sole judge of the necessity and of the amount to be taken, but it was incumbent upon it to prevent leakage or other wastage to a more than fair and reasonable extent; and that a finding of negligence on the part of any officer of the State was not necessary. *Id.*

STATE COMPTROLLER.

See COMPTROLLER.

STATUTES.

Although repeals by implication are not favored, yet where two statutes are manifestly repugnant and tend to nullify each other, the older enactment must yield to and will be considered as repealed by the later. *Lyddy v. L. I. City.* 218

— Chap. 606, *Laws of 1875.*

— Chap. 250, *Laws of 1884.*

— Chap. 898, *Laws of 1882.*

— Chap. 190, *Laws of 1870.*

— Chap. 187, *Laws of 1870.*

See In re N. Y. C. Co. v. Mayor, etc., 1.

—Chap. 140, *Laws of 1850*.
 —Chap. 353, *Laws of 1882*.
See People v. N. Y. L. E. & W. R. R. Co. 58.
 —Chap. 729, *Laws of 1873*.
See Heiser v. Mayor, etc., 68.
 —1 R. S. 754, § 23.
See In re Morgan, 74.
 —Chap. 427, *Laws of 1875*.
See People ex rel. Millard v. Chapin, 96.
 —1 R. S. 768, § 39.
See Lerche v. Brasher, 157.
 —Chap. 385, *Laws of 1878*.
See Brehm v. Mayor, etc., 186.
 —Chap. 719, *Laws of 1870*.
 —Chap. 461, *Laws of 1871*.
See Lyddy v. Long Island City, 218.
 —Chap. 482, *Laws of 1875*.
 —Chap. 554, *Laws of 1881*.
See Hubbard v. Sadler, 223.
 —Chap. 418, *Laws of 1886*.
See Jones v. Jones, 234.
 —Chap. 456, *Laws of 1857*.
 —1 R. S. 888, § 4.
 —1 R. S. 887, §§ 1, 2.
See People ex rel. P. R. R. Co. v. Com'rs, 240.
 —2 R. S. 49, § 177.
See Lahr v. E. R. R. Co. 268.
 —Chap. 483, *Laws of 1885*.
See In re McPherson, 306.
 —1 R. S. 722, §§ 55, 58.
See Weeks v. Cornwell, 325.
 —Chap. 181, *Laws of 1876*.
 —Chap. 598, *Laws of 1870*.
 —Chap. 520, *Laws of 1870*.
See Kuns v. City of Troy, 344.
 —Chap. 427, *Laws of 1855*.
 —Chap. 120, *Laws of 1873*.
 —Chap. 448, *Laws of 1885*.
See People, ex rel. Wright v. Chapin, 249.
 —Chap. 269, *Laws of 1880*.
See People, ex rel. R. W. & O. R. R. Co. v. Haupt, 377.
 —Chap. 458, *Laws of 1883*.
See Furey v. Town of Gravesend, 405.
 —1 R. S. 741, §§ 12, 13, 14.
See Jones v. Fleming, 418.
 —Chap. 220, *Laws of 1866*.
 —Chap. 517, *Laws of 1875*.
See Pomfrey v. Village of Saratoga, Springs, 459.
 —Chap. 371, *Laws of 1871*.
See E. C. S. Bank v. Coit, 532.
 —Chap. 670, *Laws of 1869*.
 —Chap. 864, *Laws of 1873*.
 —Chap. 700, *Laws of 1871*.
See Monk v. Town of New Utrecht, 553.
 —Chap. 144, *Laws of 1818*.
 —Chap. 271, *Laws of 1825*.

—Chap. 321, *Laws of 1878*.
See S. M. Co. v. State, 562.
 —Chap. 43, *Laws of 1884*.
See People ex rel. Haughton v. Andrews, 570.
 —1 R. S. 888, § 4.
 —Chap. 232, *Laws of 1888*.
 —Chap. 283, *Laws of 1862*.
 —Chap. 410, *Laws of 1882*.
 —Chap. 136, *Laws of 1866*.
See Assn. for Colored Orphans v. Mayor, etc., 581.
 —Chap. 466, *Laws of 1877*.
See Richardson v. Thurber, 606.
 —Chap. 40, *Laws of 1848*.
See Blake v. Griswold, 618.

See ACTS OF CONGRESS.
 LIMITATION OF ACTIONS.
 STATUTE OF FRAUDS.

STATUTE OF FRAUDS.

D. conveyed certain premises to plaintiff by warranty deed, receiving a mortgage thereon for part of the purchase-money. There were at the time two mortgages on the premises, one owned by defendant. Plaintiff paid the amount of his mortgage before due to defendant, who then held it as collateral security for obligations of D., in consideration of an oral agreement on its part to release the premises from its mortgage, and to procure a release of the other mortgage. It released its own, but did not procure a release of the other, which was subsequently foreclosed and the premises sold. In an action to recover damages for a breach of the agreement, *held*, that it was not within the statute of frauds, as the undertaking of defendant was original, not collateral, nor was it a contract for the sale of lands or an interest therein. *McCraith v. Nat. M. V. Bk.* 414

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STIPULATION.

Where an order of General Term, reversing a judgment and grant-

[ing a new trial, is affirmed on appeal to this court, the stipulation given on appeal compels an award of judgment absolute against the appellant, although it appears he was entitled to part of the relief granted by the judgment. *Conklin v. Snider*. 641

STOCK.

1. The will of M. gave to his executors certain portions of his estate in trust "to receive the rents, interest and income," and to apply the net amounts thereof to the use of the testator's widow during her life, remainder to beneficiaries named. The testator died during the night of April 20, 1881. The trust fund included certain shares of stock of the P. R. R. Co. On April 14, 1881, a dividend of \$5,000 was declared on this stock, "payable May 2, 1881." On final accounting the executors charged themselves with this sum, treating the dividend as principal. *Held*, no error; that as soon as the dividend was declared the owner of the shares was entitled to it, and it became part of his estate; that the fact it was made payable at a future time was immaterial, that the dividends to which the life tenant was entitled as income were only those declared after the testator's death. *In re Kernochan*. 618
2. On the same principle, *held*, that the widow was entitled to the whole of an extra dividend, declared after such death, although made from net earnings accumulated before that time; that, whenever earned, they were not profits until so declared. *Id.*
3. Prior to the death of the testator the P. R. R. Co. had accumulated a fund from earnings which was set aside as a sinking fund to pay outstanding obligations. Certain of the stockholders, including the executors, entered into an agreement with another company for a sale of their stock to the company at \$250 per share, the company to have the sinking fund,

and to pay said shareholders a ratable portion thereof, which was equivalent to \$15.74 per share. In the account this was included as part of the price received and credited as principal. *Held*, no error; as it was received, not as a dividend, but as part of the price for which the stock was sold, and so belonged to the remaindermen. *Id.*

4. The executors classed as income the value of certain options or privileges given to stockholders by various companies to subscribe for and take at par certain stocks and bonds. *Held*, error; that as the right accrued only on condition the estate chose to purchase or pay for the bonds or stocks, if the options were accepted the purchases operated to increase the capital or change its manner of investment, and so the value of the options did not belong to the life tenant. *Id.*

STREETS.

See HIGHWAYS.

SUBMISSION OF CONTROVERSY.

1. The provision of the Code of Civil Procedure (§ 1279), authorizing the submission of a controversy upon facts admitted, is limited to controversies which can be followed by an effectual judgment upon the submission. *Cunard S. S. Co. v. Voorhis*. 525
2. Where, therefore, the only relief the plaintiff would be entitled to on the facts agreed upon is an injunction, as that relief is expressly prohibited (§ 1281) in such a proceeding, the submission should be dismissed. *Id.*

SUBROGATION.

1. F. & W., who were copartners, executed two mortgages, one to secure a bond executed by F, the

other a bond executed by both. Each of the bonds was given for partnership indebtedness. The mortgages covered certain lands owned by F. & W. jointly, also lands owned by F. alone. F. & W. subsequently conveyed the mortgaged lands owned by them, by full covenant deed, for a price that covered the full value of the unincumbered fee. F. died, and thereafter plaintiff, the administratrix of the mortgagee, negotiated a settlement of various claims the estate held against W., and plaintiff executed to W. a release and discharge, among other things, of all several and joint liability on account of the bonds and mortgages, which release recited that it was not intended "to affect or discharge the liability" of F., "or intended to affect any other security for any of said demands other than the personal liability of" W. In an action to foreclose the mortgages, *held*, that the release discharged the party primarily liable for the mortgage debt, and so cut off and destroyed the equitable right of subrogation belonging to the surety in case of payment, and, therefore, that the lien of the mortgages upon the lands bound as security was discharged. *Murray v. Fox*. 382

2. Prior to the execution of the release by plaintiff, W. compromised with the said grantee of a portion of the mortgaged premises certain claims held by it, and received a release of himself and the heirs of F. upon the covenants in the deed, and from all existing debts, matured and unmatured, with a covenant that the releasor had not parted with or impaired its title "to any such debts." *Held*, that the release of the covenants in the deed did not *ipso facto* discharge the equities which might arise in favor of the covenantee against the covenantor, or make the land principal debtor for the mortgage; but that it remained chargeable only as surety, and the right of subrogation remained, which was cut off by plaintiff's release. *Id.*

SUMMONS.

Defendant, a corporation created under the laws of, and doing business in another State, sold to plaintiffs, who were doing business in this State, certain agricultural implements, with an agreement to indemnify and defend them from all prosecutions because of any alleged infringement of any patent in selling the implements, provided notice was given to it, and it was allowed to take charge of the case. An action having been so commenced against plaintiffs they notified defendant and required it to take charge of the defense; this it did not do, and judgment was rendered against plaintiffs in that action. The summons in an action upon the guaranty was served in this State upon a director of the defendant. On motion to set aside the service, *held*, that the cause of action arose in this State and the summons was properly served. (Code of Civ. Proc., § 432, subd. 3.) *Childs v. Harris M'fg Co.* 477

SUPERVISORS.

1. The act of 1875 (chap. 482, Laws of 1875), giving to the board of supervisors of any county, containing an incorporated city of over 100,000 inhabitants, where contiguous territory has been mapped out into streets and avenues, power to lay out, open and grade the same, as amended in 1881 (chap. 554, Laws of 1881), authorizes the board of supervisors to provide for the issuing of short-term town bonds, upon which to borrow money to pay awards to land owners, the town to be reimbursed by the local assessment, and in case of a deficiency, by general taxation. *Hubbard v. Sadler*. 228
2. The fact that the act authorized the issuing of long term bonds for certain, special and extraordinary expenditures does not exclude an intent to bestow authority to borrow money on the town bonds for other purposes. *Id.*

3. When the Legislature has conferred authority upon a board of supervisors, as to all incidents and details, and the mode of accomplishing a purpose, if the board acts within the scope of the legislative enactment, its action may not be reviewed. *Id.*
4. The duty imposed upon the board of supervisors of the county requires not only that it shall establish a ratio upon which the tax is to be based, but also, that it shall compute and enter in the roll, in a column opposite the valuation of real and personal estate, the amount of tax levied thereon; this must be done under the supervision of the board, and before the roll can be certified to as completed. *People v. Hagadorn.* 516
5. The duty of passing upon the the question of a corrected assessment-roll, and certifying to its accuracy and completeness as a perfected roll, is a judicial duty which cannot be delegated. *Id.*
6. Where, therefore, it appeared that a board of supervisors fixed the ratio of tax upon the aggregate amount of valuation, and without extending the tax, signed the roll and attached the collector's warrant thereto, and delivered it to the supervisor of the town, with authority to compute and enter the amount of the tax, which he did, and then delivered the roll and warrant to the collector, *held*, that the roll and warrant were fatally defective; that a return of the non-payment of taxes so levied conferred no authority upon the State comptroller to sell land thus taxed, and that the State as a purchaser at such a sale acquired no title. *Id.*
- (Code of Civ. Pro., § 2545.) *In re Morgan.* 74
2. The failure of a surrogate to make findings of fact and law as required by the Code of Civil Procedure (§ 2545), upon the trial of an issue of fact before him, is not a ground of objection to his decision on appeal. It is the duty of the party appealing to procure to be made such findings or refusals as will present, through appropriate exceptions, the question he desires to argue; if he omits to do this, no question is presented for review. *In re Hood.* 108
3. Although under a will it is possible for an executor to exchange the character for that of trustee, until he is discharged as executor by decree of the surrogate and directed to hold the remaining assets as trustee, or at least until there has been a payment to him as trustee, a new account opened and kept in the new capacity and a division of the fund, allotting to different beneficiaries their specific proportions, he remains as executor only, and is removable such for misconduct. After such removal, upon petition of his successor, the Surrogate's Court has jurisdiction to compel him to account for and deliver over to his successor the assets in his hands. (Code of Civ. Pro., §§ 2605, 2724.) *Id.*
4. An order of a surrogate, adjudging against the denial of an administrator, that there are assets of the estate in his hands, and requiring him to account therefor, is an order affecting a substantial right, and so is appealable to the General Term. (Code of Civ. Pro., § 2570.) *In re Gilbert.* 200
5. No jurisdiction is conferred upon the Surrogate's Court by the Code of Civil Procedure, or by previous statutes, to judicially settle the accounts of a testamentary guardian, either on his own application or on that of any other person, while the guardianship continues, and an attempted settlement of the kind, made either before or since the adoption of the

SURROGATE'S COURT.

1. An exception to an erroneous ruling of a surrogate on the trial by him of an issue of fact is not a ground for reversal, where it does not appear that the exceptant was necessarily prejudiced thereby.

- Code is void for want of jurisdiction. *In re Hawley*. 250
6. *It seems* the Surrogate's Court has jurisdiction to settle such an account only in the three cases specified in said Code (§ 2847), *i. e.*, where the ward has attained his majority; where he has died, and where the guardian has been superseded by a successor. *Id.*
 - 7 The provision of the Code giving the Surrogate's Court authority, on the application of the infant, or of a relative on his behalf, to compel such a guardian to render and file an account annually (§§ 2842, 2845, 2855), are intended merely to inform that court as to the manner in which the guardian is discharging his trust, but do not authorize the judicial settlement of such intermediate accounts, or the allowance of commissions on such accountings. *Id.*
 8. As a Surrogate's Court is one of inferior and limited jurisdiction, those claiming under the decree of a surrogate must show affirmatively his authority to make it, and the facts which give him jurisdiction. *Id.*
 9. The nature and extent of the jurisdiction of surrogates over testamentary trustees and guardians under the Revised Statutes, and under other statutes down to and including the Code of Civil Procedure, stated. *Id.*
 - 10 The act of 1885 (chap. 483), "To tax gifts, legacies and collateral inheritances in certain cases," confers no powers upon Surrogate's Courts prohibited by the Constitution; the imposition and collection of the tax, as provided in the act, is simply an incident in the settlement of the estate of a deceased person, and is not so foreign to the jurisdiction generally exercised by said courts as to make the act obnoxious to any constitutional objection. *In re McPherson*. 806
 - 11 An appeal to this court from an affirmance by the General Term of a surrogate's decree, upon trial of an issue of fact, brings nothing here for review not presented by appeal to the General Term, and, upon appeal to the General Term, no finding or decision can be reviewed that was not excepted to. (Code of Civ. Pro. § 2515.) *In re Kellogg*. 648
 12. Prior and up to the death of a testator, K., his executor, was his general agent. As such he placed in the hands of an attorney a claim for collection. The attorney was directed by the testator to pay the proceeds to K. This he did by sending a check for the avails of collection to the office of K., payable to his order. The testator died on the same day, after the delivery of the check. Two days thereafter K. drew the money on the check and credited it in his account with the testator, which prior to the credit showed a balance due K. The testator died insolvent. *Held*, that the surrogate properly allowed the credits; that when the check was delivered K. could treat it as funds in his hands to be applied, so far as needed, in payment of what the testator then owed him, and when the money was drawn upon the check the payment related back to the delivery of the check, and he drew it as payee, not as executor. *Id.*
 13. Where objection to a claim paid by an executor that it was barred by the statute of limitations at the time of payment was not taken upon settlement of the executor's accounts, it may not be raised on appeal. *Id.*
 14. Upon settlement of the accounts of an executor the surrogate improperly charged him with an item of \$11,000 and credited him with the amount of a claim against the estate which he had paid in full. The General Term, on appeal, struck out the erroneous charge, and as this left the estate insolvent, readjusted the account by disallowing the overpayment. *Held*, that the General Term had the right to so modify the decree instead of sending it back for a rehearing before the surrogate. (Code of Civ. Pro. § 2587.) *Id.*

SUSPENSION OF THE POWER OF ALIENATION.

P., by an instrument termed by him therein his deed of trust, and by letters of instruction referred to therein, transferred to plaintiff certain securities and funds, in trust, to invest and collect the income thereon during the life of P. to pay over the income to K., to be by him appropriated for the use of four beneficiaries named, and at the death of P. the principal to be disposed in accordance with instructions contained in a writing sealed up and delivered with the instrument, with directions that it should not be opened until such death. By the sealed instructions it was provided that the income should, after the death of P., be devoted to the use of the four beneficiaries named, or the survivors or survivor in specified proportions the principal to be paid to them "or survivor or survivors" in the same proportions, when the youngest shall come of age. *Held*, that the survivorship referred to was that existing at the death of the settlor, and so that the absolute ownership was suspended only during the continuance of two lives at most, both of which were in being when the trust was created. *Van Cott v. Prentice*. 45

TAXATION.

See ASSESSMENT AND TAXATION.

TAX SALES.

1. The sufficiency of the evidence upon which is based a decision of the State comptroller as to who is entitled to the purchase-money paid upon an invalid sale of land for taxes, which he is required to refund out of the State treasury (§§ 80, 83, 85, chap. 427, Laws of 1855), may not be reviewed by *mandamus*; nor can the decision, even if wrong, be so rectified. *People ex rel. Millard v. Chapin*. 96

2. The mere record of a deed from the purchaser of an invalid tax sale, is not notice to the comptroller of the right of the grantee to have the purchase-money refunded to him. *Id.*

3. The provision of the act of 1855, "in relation to the collection of taxes on lands of non-residents" (§ 83, chap. 427, Laws of 1855), which authorizes the State comptroller where he shall discover that a sale of land for taxes was invalid or ineffectual to give title to the lands sold, to cancel the sale and refund the purchase-money, was intended to relieve the purchaser from the consequence of a defective tax title; the owner of the land is not properly a party to the proceedings; nor is he permitted in this way to test the validity of the sale. *People ex rel. Wright v. Chapin*. 369

4. Where, therefore, the owner of lands sold for taxes presented his petition to the comptroller, asking that the sale be canceled in pursuance of the authority conferred upon the comptroller by said act, and that officer denied the prayer of the petition. *Held*, that no right of the petitioner was finally determined, nor was he a person aggrieved by the decision, within the meaning of the provisions of the Code of Civil Procedure (§§ 2123, 2127), regulating the review by *certiorari* of the determination of a body or officer, and so, that he had no right to a review of the determination of the comptroller. *Id.*

5. Where it appeared that a board of supervisors fixed the ratio of tax upon the aggregate amount of valuation, and without extending the tax, signed the roll and attached the collector's warrant thereto, and delivered it to the supervisor of the town, with authority to compute and enter the amount of the tax, which he did, and then delivered the roll and warrant to the collector, *held*, that the roll and warrant were fatally defective; that a return of the non-payment of taxes so levied conferred no authority upon the

State comptroller to sell land thus taxed, and that the State as a purchaser at such a sale acquired no title. *People v. Hagadorn*. 516

6. Where the comptroller has in his hands unpaid reported taxes for a number of years upon a piece of land, some of which are legal and some invalid, he may not enforce the payment of the illegal taxes by taking proceedings to collect the legal ones; he cannot compel the owner of the land in order to regain possession of his property to pay a sum of money which the State has no right to demand. *Id.*
7. A sale, therefore, of the land for the taxes of several years, one or more of which is illegal and void, is an excess of jurisdiction and void. *Id.*

TITLE.

1. In an action to compel the specific performance, on the part of the vendee, of a contract for the sale of lands, plaintiff claimed title under a deed from an assignee, in bankruptcy. It appeared that in 1842 the then owner of the land was adjudged a bankrupt, and the official general assignee in bankruptcy became vested with the title; no debts were proved against the estate of the bankrupt before his discharge and but one small one thereafter. In 1844 the assignee advertised and sold the land at auction and it was bid off by one R. for two dollars. In 1866, T. claiming to have purchased the bid of R. from his administratrix, applied for and obtained a deed from the assignee which was recorded in 1869. No possession accompanied the title under the assignee's sale. *Held*, that the title was defective and defendant could not be compelled to complete the purchase; that if there was a binding contract for the sale of the land by the assignee to R., the administratrix of the latter had no interest in the land, as the interest of her intestate was real estate and went to his heirs; and that, therefore, she conveyed

no right or interest by her assignment, and the assignee in bankruptcy had no authority to convey to T. *Palmer v. Morrison*. 132

2. While the delivery of personal property to the vendee under an executory contract of sale is an important and controlling fact on the question as to change of title, it is not conclusive; if the delivery is simply to meet some term of the contract not inconsistent with the retention of title by the vendor, it will not pass the title contrary to the intention. *Cornell v. Clark*. 451
3. So where anything remains to be done to ascertain and identify the subject of sale the title does not pass. *Id.*
4. A railroad corporation entered into a contract with M., by which the latter agreed to deliver to the former, at certain specified points on the company's lands, 20,000 ties, at fifty-five cents each for first-class ties, and thirty-five cents "for what shall be adjudged second-class ties," to be inspected and counted by a person named. The company agreed to advance fifteen cents apiece for ties as they were delivered, "the remainder to be paid on or about the time the ties are taken and used." M. delivered a quantity of ties, which were counted, and the company paid the advance agreed upon. The ties were never inspected or divided into classes. The company became insolvent, and its property and franchises were sold on foreclosure. In an action wherein the question was as to the title to the ties, *held*, that the title did not pass to the company by the delivery; that it was not bound to take all the ties, but only such as should be adjudged first and second-class, the inspector having power to reject unmerchantable ties, and so, it could not be known until inspection and separation were made what part of the ties were to be taken. *Id.*
5. Where an action to recover damages for the alleged unlawful

taking of timber cut from land of which plaintiff has not the actual possession, is based wholly upon a constructive possession, arising out of his claim of title to the land, defendant may contest the validity of such title. *People v. Hagadorn.* 516

TOWNS.

Under the provisions of the statute prescribing the method of laying out highways in the towns of the county of K. (Chap. 670, Laws of 1869), in compliance with the provisions of the act of 1878 (Chap. 364, Laws of 1878), directing the commissioners appointed by the former act to lay out "Eighty-sixth street," said street was laid out and constructed in accordance with the plan laid down by the commissioners. The street was graded up in one place about thirty feet above the adjoining land. No provision was made in the plan for a railing or fence on the outer lines of the road at the top of the bank. The commissioners of highways of the town of N. U. (defendant), upon whom is imposed the duty of keeping that portion of the street in their town, when completed, in repair, kept the roadway in repair and in so doing expended all the moneys in their hands. In an action under the act of 1881 (Chap. 700, Laws of 1881, making towns liable in certain cases for injuries caused by a defective highway, to recover damages for injuries alleged to have been sustained by reason of negligence on the part of the commissioners in not erecting some barrier at the top of the bank. *Held: First.* The omission was not a defect in the highway. *Second.* Conceding it to have been such, as the Commissioners of highways had expended the moneys in making other repairs they deemed more urgent, the town was not liable. *Third.* The defect, if any, was in the plan and was not chargeable on the officers of the town. *Monk v. Town of New Utrecht.* 552

See GRAVESSEND (TOWN OF.)

TOWN BONDING.

1. The act of 1875 (Chap. 483, Laws of 1875), giving to the board of supervisors of any county, containing an incorporated city of over 100,000 inhabitants, where contiguous territory has been mapped out into streets and avenues, power to lay out, open and grade the same, as amended in 1881 (Chap. 554, Laws of 1881), authorizes the board of supervisors to provide for the issuing of short-term town bonds, upon which to borrow money to pay awards to land owners, the town to be reimbursed by the local assessment, and in case of a deficiency, by general taxation. *Hubbard v. Sadler.* 223
2. The fact that the act authorized the issuing of long term bonds for certain, special and extraordinary expenditures does not exclude an intent to bestow authority to borrow money on the town bonds for other purposes. *Id.*

TRESPASS.

Where an action to recover damages for the alleged unlawful taking of timber cut from land of which plaintiff has not the actual possession, is based wholly upon a constructive possession arising out of his claim of title to the land, defendant may contest the validity of such title. *People v. Hagadorn.* 516

TRIAL.

1. A party who has permitted the reception of improper evidence without properly objecting thereto, may not thereafter object to the same, and has not a legal right to have the same stricken out. *In re Morgan.* 74
2. An objection made before a question is put calling for the evidence objected to, where there has been no offer of evidence, is premature, and so not available. *Id.*

8. Plaintiffs, whose testator had carried on a manufacturing business, sold to defendants the "plant," and leased to them the buildings in which the business had been carried, on and after the lessees had taken possession, sold and executed to them a bill of sale of "the entire manufactured stock, * * * now on hand at foundry and store-rooms," which were part of the premises so leased. Plaintiffs immediately began an inventory of the property, which when completed was delivered to defendants. A large amount, consisting proportionally of the more valuable part of the goods which had appeared in and was exhibited as part of the stock at the time of the sale, was omitted from the inventory, and it appeared had been delivered by plaintiffs to other parties, after the day of sale, upon orders received by them previous to that time, but as to which there had been no valid agreement of sale. In an action to recover the contract-price for the goods delivered, defendants set up as a counter claim damages for the removal of said goods. The court on the trial left it to the jury to determine what the parties meant by the "stock on hand" in the bill of sale, and charged that there was some part of the stock plaintiffs did not own at the time of the sale. *Held*, error; that as plaintiffs failed to show a contract, which, as between themselves and the alleged purchasers of the goods so taken from the stock, transferred the title of the property, plaintiffs remained the legal owners and entitled to dispose of it to defendants; and, as the property was on the premises occupied by defendants, the execution of the bill of sale passed the title to them; that assuming a valid executory contract of sale had been made by plaintiffs prior to the sale to defendants, the purchaser acquired no title to any specific property, and on the refusal of the vendors to fill the orders had simply a right of action for damages; and that it was the undoubted right of defendants to have the meaning and intent of their contract determined by the court. *Brady v. Cassidy.* 147
4. When the terms and language of a contract are ascertained, in the absence of technical phrases, or of terms, the meaning of which is obscure, or of latent ambiguities, rendering the subject-matter of the contract uncertain and doubtful, the office of interpreting its meaning belongs to the court. *Id.*
5. In an action to recover for services alleged to have been rendered to defendant's testator, after proof of the rendition of the services, plaintiff, as a witness in his own behalf, was asked if he had been paid therefor, this was objected to as involving a personal transaction with the deceased. The objection was overruled and plaintiff answered "No." Defendants offered no evidence tending to show payment. *Held*, that while the objection was good the evidence was wholly immaterial and could have done no harm, as payment was an affirmative defense, and the burden of proving it was upon the defendant. *Lerche v. Brasher.* 157
6. The plaintiff was asked and permitted to testify under objection and exception as to what services he rendered, excepting personal transactions or communications with the deceased. *Held*, that the question was proper in form, and if any improper evidence was given under it, it was defendant's duty to object and move to strike out so much of the answer as exceeded the legitimate scope of inquiry. *Id.*
7. Where, in an action by judgment-creditors to set aside a conveyance by a husband through a third person to his wife, on the ground that the same was fraudulent as against creditors; it appeared that the conveyance was for a good consideration, and there was no proof of fraudulent intent or of facts from which fraudulent intent could be inferred. *Held*, that a refusal to nonsuit was error, although as against creditors the conveyance might have been converted into a

mortgage; that such relief could only be given upon proper evidence in an action where it was consistent with the case made by the complaint and embraced within the issues. *Truesdell v. Barles*. 164

8. In an action by assignees for the benefit of creditors, to recover possession of property covered by the assignment, which had been levied upon by defendant as sheriff, by virtue of an attachment against the assignor, the defendant alleged the assignment to be fraudulent and void as to creditors. On the trial defendant called the assignor as a witness, and after he had testified to facts and circumstances, from which an inference of fraud could properly be drawn, he gave an explanation thereof, which, if true, was sufficient in law. Defendant then rested, and the court directed a verdict for plaintiff, on the ground that defendant was bound by the explanatory evidence, for the reason that he could not discredit or impeach his own witness. *Held*, error; that the witness was to be regarded as adverse to the party calling him, and the same credit was not necessarily to be given to the testimony against that party, as to that in his favor; and that it was a proper question for the jury as to what degree of faith should be given under the facts of the case to the explanatory testimony. *Becker v. Koch*. 894.

9. *It seems* the rule prohibiting a party from impeaching his own witness applies only to prevent, *First*. The calling of witnesses to impeach the general character of the witness. *Second*. Proof of prior contradictory statements by him. *Third*. A contradiction of the witness by another when the only effect is to impeach and not to give material evidence upon any issue in the case. *Id.*

10. Snow and ice which had fallen from time to time from a barn adjoining the sidewalk on one of defendant's streets, had accumulated on the sidewalk to the height of about three feet above the sur-

face, and about two and a half feet above the snow on the rest of the sidewalk. This accumulation had been there about two weeks when plaintiff, in passing over it, fell and was injured. The evidence tended to show that this embankment of snow and ice was perfectly visible; there was a light covering of recent snow over the ice. *Held*, a refusal of the court to charge, as matter of law, that it was negligence for plaintiff, under the circumstances, to attempt to pass over the embankment was not error. *Pomfrey v. Vill. Saratoga Springs*. 459.

See CRIMINAL TRIAL.

TROY (CITY OF).

1. In an action in the nature of a *quo warranto* to determine the title to the office of chamberlain in the city of Troy, it appeared that by the city charter the mayor has authority, in case of a vacancy in said office, to nominate for a full term of three years, and also, in case of the absence of the incumbent to appoint for a temporary period. In February, 1884, the mayor addressed a communication to the common council, which recited that C., the then incumbent of the office, whose term expired October 7, 1884, "had abandoned his office, and according to accounts had left the city" a defaulter, and appointed defendant "to discharge the duties of the office" during the absence of C. The relator was appointed and confirmed as chamberlain in May, 1885, "for the ensuing term of three years." *Held*, that the appointment of defendant was intended merely as a temporary one, and if the mayor had no power to make such an appointment it was a nullity and did not enure as an appointment for a full term. *People ex rel. Bridgeman v. Hall*. 170
2. In February, 1885, another action in the nature of a *quo warranto* was brought on the relation of the present relator against de-

fendant. The relator then claimed under a nomination and appointment made January 15, 1885; defendant claimed under the same appointment upon which he bases his claim in this action. Judgment was rendered in that action in June, 1885, against the relator and in favor of defendant, but it was declared therein that it was not decided or intended to be decided, whether defendant was legally chamberlain under a temporary appointment or under one for a full term, and the relator was defeated on the ground that he had failed to give a proper bond. *Held*, that said judgment, while it necessarily determined that defendant's appointment was valid, was not conclusive that it was for a full term, and so the judgment did not constitute an estoppel. *Id*

3. The duty of keeping the streets of the city of Troy in repair and free from obstructions is, under its charter, a corporate duty. (§ 15, chap. 131, Laws of 1816; § 2, tit. 2, chap. 598, Laws of 1870.) *Kuns v. City of Troy.* 844

4. The city was not relieved from the duty so imposed by the creation of the board of police commissioners under and by the act of 1870 (chap. 520, Laws of 1870); even assuming that board as so constituted is an independent body, not subject to the control of the municipal corporation. The powers conferred and duties enjoined upon the police department by said act in respect to the streets are auxiliary only, not exclusive. *Id.*

TRUSTS AND TRUSTEES.

1. P., by an instrument termed by him therein his deed of trust, and by letters of instruction referred to therein, transferred to plaintiff certain securities and funds, in trust to invest and collect the income thereon during the life of P. to pay over the income to K., to be by him appropriated for the use of four beneficiaries named,

and at the death of P. the principal to be disposed in accordance with instructions contained in a writing sealed up and delivered with the instrument, with directions that it should not be opened until such death. A full power of revocation was reserved, and it was provided, as a condition of the grant, that the beneficiaries should "have no legal or equitable right to the principal or income," that the trustee should hold, subject to the grantor's direction and control, until his death; it was also declared that if any attempt should be made to interfere with the execution of the trust, or to claim the securities contrary to the conditions of the instrument that the trust should at once cease and determine. In an action to recover possession of the securities which had come into the hands of defendants, the executors of the will of P., *held* that a valid trust was fully and completely constituted, and as the same was not revoked by the settlor during his life the trustee was entitled to the possession of the trust property; that it was immaterial that the grant was voluntary and without consideration; that the declaration that the beneficiaries should have no legal or equitable right was not intended as a denial of an equitable right to enforce the trust as against the trustee while the settlement remained unrevoked, but only as a denial of any right as against the settlor; also that the validity of the title of the trustee was not affected by the fact that he held subject to the control and direction of P.; that while the trust continued and existed only at the will of the settlor it was good and effectual until revoked. *Van Cott v. Prentice.* 45

2. By the sealed instructions it was provided that the income should, after the death of P., be devoted to the use of the four beneficiaries named, or the survivors or survivor in specified proportions, the principal to be paid to them "or survivor or survivors" in the same proportions, when the youngest shall come of age. *Held*, that the survivorship refer-

red to was that existing at the death of the settlor and so that the absolute ownership was suspended only during the continuance of two lives at most, both of which were in being when the trust was created. *Id.*

8. It was claimed that the sealed paper was testamentary in its character, and so not legally executed. *Held*, untenable; that it was a component part of the declaration of trust and spoke from its date, and the property then became vested in the trustee; that the result was not affected by the ignorance of the trustee or the beneficiaries of the contents of the paper until the death of P., as it was not essential that the trustee should know the contents in advance of the time when they were to guide his action, and he having accepted the trust with full knowledge that he was to learn of the ultimate disposition of the trust fund only at that time, and the beneficiaries, when the terms of the trust were disclosed, having claimed its benefit, this was sufficient. *Id.*

4. S., by his will, divided his residuary estate into sixty parts, six of which he gave to his son A., an infant, for his sole and separate use and benefit; he appointed his executors, "guardians and trustees," of the estate of such of his children as should not be of the age of twenty-one at the time of his decease, to continue such until they should respectively arrive at that age. H., one of the executors named, alone qualified. *Held*, that he was not constituted by the will a trustee, within the meaning of the statute, but simply guardian, as the will created no trust, and that the statutory provisions in regard to the accountings of testamentary trustees were not applicable to him. *In re Hawley.* 250

5. To constitute a testamentary trustee it is necessary that some express trust be created by the will; merely calling an executor or guardian a trustee does not make him such. *Id.*

6. W. died, leaving a large amount of real and personal property, a widow and no descendants. By his will he gave to his widow absolutely certain real and personal estate and a life estate in four lots in the city of New York. The will contained seventeen clauses, each devising parcels of land to his executors in trust, to pay the net income to a person named during life. The land mentioned in each clause was, on the death of the life beneficiary, devised to his wife and heirs, or where there was no wife to his heirs or issue. In several of the clauses was contained a provision that the issue of such life beneficiaries as shall have died shall take the parents' share. A lot of land was also devised to P. in fee, and one to each of two servants of the testator, D. and C. By the twenty-fourth clause the testator gave the residue of his estate, real and personal, not "bequeathed in fee or upon trust," to his executors, "to use the same as in their judgment they deem to be for the best interest" of the whole estate; and, to raise money for that purpose, he authorized them to mortgage "the piece or parcel of land being the residue and remainder" of his estate, and after paying taxes, etc., and such amounts as they might deem necessary for repairs, etc., "to divide and pay the remainder at any time within ten years to each and every of my legatees hereinbefore named," except D. and C., "in the proportion in which his, her or their specified legacies hereinbefore named and bequeathed bear to each other, the heirs of such legatee as may have died to take the share which said legatee would, if living, have been entitled." By the twenty-fifth clause, upon the termination of the real estate trusts where the fee was undisposed of, the testator gave "the fee of said real estate trust property" to his legatees, excepting D. and C., to be divided among them in the same proportion as specified in the twenty-fourth clause; the testator declaring his meaning to be to regard each of his legatees, except D. and C., "a legal heir" to

his estate, "limited to the said trust property in the proportion named."

The real estate referred to in the twenty-fourth and twenty-fifth clauses consisted of the four lots devised to the widow for life. In an action brought after the death of the widow, for partition of said real estate, *held* that under the twenty-fifth clause said real estate was legally devised, the devisees being the seventeen persons named as beneficiaries in the seventeen trusts, together with P.; that the proceeds of sale should be divided among them, as to the seventeen life beneficiaries, in proportion to the value of the specific real estate from which they were respectively entitled to the income, and as to P., in proportion to the value of the fee of the land given to him; that the only real estate trust attempted to be created by the twenty-fourth clause was to mortgage it, which trust was invalid because not for the benefit of legatees or for the purpose of satisfying any charge upon the land (1 R. S. 728, § 53); that even if valid it vested no estate in the trustees (§ 56) but was valid only as a power, and so in any event it did not suspend the power of alienation, or prevent the vesting of the estate in the devisees mentioned in the twenty-fifth clause. *Weeks v. Cornwall*. 825

7. The will of C., after a gift of his residuary estate to his daughter, the defendant, and "to her heirs and assigns forever," contained this provision "I commit my granddaughter (plaintiff) * * * to the charge and guardianship of my daughter. * * * I enjoin upon her to make such provision for said grandchild out of my residuary estate * * * in such manner and at such times and in such amounts as she may judge to be expedient and conducive to the welfare of said grandchild, and her own sense of justice and Christian duty shall dictate." In an action wherein the plaintiff sought to have it adjudicated that a trust was imposed upon the residuary estate for her benefit, and wherein defendant, by her answer, recognized the moral obligation resting

upon her and averred her intention of performing it. *Held*, that no such trust was created, nor did defendant take subject to a charge in favor of plaintiff; but that she took an absolute title and the provision to be made for plaintiff was left wholly to her discretion, as to the amount and manner of the provision and the time when it should be made, the exercise of which discretion could not be interfered with by the court. *Lawrence v. Cooke*. 632

VENDOR AND PURCHASER.

1. Where a vendor brought an action to recover the price of goods sold, and obtained an attachment therein, on the ground that the defendant had removed and disposed of his property with intent to defraud his creditors, which was levied on property of the defendant, but nothing was obtained by plaintiff under the attachment, and said action was subsequently discontinued, by order of the court, on notice to the defendant; *held*, that plaintiff was not precluded thereby from rescinding the sale, on the ground that it was induced by fraud on the part of the vendee, and from bringing an action to recover the goods sold, in the absence of proof that the vendor brought the first action with knowledge of the fraud. *Hays v. Midas*. 602
2. Where a vendor of goods renders accounts to the purchaser periodically and the latter, after examination, retains them without objection, they constitute accounts stated and can only be opened and investigated upon proof of fraud or mistake. *Manchester Paper Co. v. Moore*. 680
3. Where goods were delivered under a contract by which the purchaser agreed to pay the "ruling market rates," and it appeared there were two market rates, one for goods of the kind bought of importers and another for them as sold by jobbers, *held*, it was competent to give in evidence the

conversation of the parties and the surrounding circumstances for the purpose of showing which of the two was intended by the parties. *Id.*

See SALES.

VESSELS.

See NAVIGATION.

WAIVER.

1. Where the statutory prohibition (Code of Civ. Pro., § 834) against the disclosure by a physician of information acquired by him while attending a patient in his professional capacity, has been expressly waived by the patient, and the waiver acted upon, it cannot be recalled; the information is then open to the consideration of the entire public, and the patient is not privileged to forbid its repetition. *McKinney v. Grand St., etc., R. R. Co.* 853
2. After the rendition of a verdict of guilty in a criminal trial, at the request of defendant's counsel, the defendant was remanded until a day named for the purpose of a motion for arrest of judgment and for a new trial; no motion was made by either party on the day named or during the term. At the next term of the court, the same judge presiding, the district attorney moved for judgment, which was opposed on the ground that the court had no jurisdiction. *Held*, untenable; that it was fairly to be assumed that defendant, by not appearing, or offering to appear, on the day named, and by not objecting, waived the delay within the meaning of and as authorized by the provision of the Code of Criminal Procedure (§ 472), in reference to the time of pronouncing judgment after a verdict of guilty. *People v. Everhardt.* 591
3. A party may not receive and accept the amount awarded to him by a judgment and appeal there-

from; and when, after an appeal has been brought, he thus accepts the benefit of the judgment, he thereby waives the appeal. *Alexander v. Alexander.* 643

WILLS.

1. The will of S., who died leaving both real and personal estate, after providing for the payment of his debts and giving certain specific legacies, gave his residuary estate to his executors to sell and dispose of the same and divide the proceeds equally between his "wife and children, share and share alike." *Held*, that the widow was not put to her election, but was entitled to dower in addition to the provision made for her in the will; that the devise to the executors was void as a trust, but valid as a power in trust, and the lands descended to the heirs, subject to the execution of the power; and that the execution of such power was not inconsistent with a dower interest, but a sale would be subject thereto. *Konealinka v. Schlegel.* 125
2. S, by his will, divided his residuary estate into sixty parts, six of which he gave to his son A., an infant, for his sole and separate use and benefit; he appointed his executors. "guardians and trustees," of the estate of such of his children as should not be of the age of twenty-one at the time of his decease, to continue such until they should respectively arrive at that age. H., one of the executors named, alone qualified. *Held*, that he was not constituted by the will a trustee, within the meaning of the statute, but simply guardian, as the will created no trust, and that the statutory provisions in regard to the accountings of testamentary trustees were not applicable to him. *In re Hawley.* 250
3. W. died, leaving a large amount of real and personal property, a widow and no descendants. By his will he gave to his widow absolutely certain real and personal

estate and a life estate in four lots in the city of New York. The will contained seventeen clauses, each devising parcels of land to his executors in trust, to pay the net income to a person named during life. The land mentioned in each clause was, on the death of the life beneficiary, devised to his wife and heirs, or where there was no wife to his heirs or issue. In several of the clauses was contained a provision that the issue of such life beneficiaries as shall have died shall take the parents' share. A lot of land was also devised to P. in fee, and one to each of two servants of the testator, D. and C. By the twenty-fourth clause the testator gave the residue of his estate, real and personal, not "bequeathed in fee or upon trust," to his executors, "to use the same as in their judgment they deem to be for the best interest" of the whole estate; and, to raise money for that purpose, he authorized them to mortgage "the piece or parcel of land being the residue and remainder" of his estate, and after paying taxes, etc., and such amounts as they might deem necessary for repairs, etc., "to divide and pay the remainder at any time within ten years to each and every of my legatees hereinbefore named," except D. and C., "in the proportion in which his, her or their specified legacies hereinbefore named and bequeathed bear to each other, the heirs of such legatee as may have died to take the share which said legatee would, if living, have been entitled." By the twenty-fifth clause, upon the termination of the real estate trusts where the fee was undisposed of, the testator gave "the fee of said real estate trust property" to his legatees, excepting D. and C., "to be divided among them in the same proportion as specified in the twenty-fourth clause; the testator declaring his meaning to be to regard each of his legatees, except D. and C., "a legal heir" to his estate, "limited to the said trust property in the proportion named." The real estate referred to in the twenty-fourth and twenty-fifth

clauses consisted of the four lots devised to the widow for life. In an action brought after the death of the widow, for partition of said real estate, *held*, that under the twenty-fifth clause said real estate was legally devised, the devisees being the seventeen persons named as beneficiaries in the seventeen trusts, together with P.; that the proceeds of sale should be divided among them, as to the seventeen life beneficiaries, in proportion to the value of the specific real estate from which they were respectively entitled to the income, and as to P., in proportion to the value of the fee of the land given to him; that the only real estate trust attempted to be created by the twenty-fourth clause was to mortgage it, which trust was invalid because not for the benefit of legatees or for the purpose of satisfying any charge upon the land (1 R. S. 728, § 55); that even if valid it vested no estate in the trustees (§ 56) but was valid only as a power, and so in any event it did not suspend the power of alienation, or prevent the vesting of the estate in the devisees mentioned in the twenty-fifth clause. *Weeks v. Cornwell*. 325

4. The will of M. gave to his executors certain portions of his estate in trust "to receive the rents, interest and income," and to apply the net amounts thereof to the use of the testator's widow during her life, remainder to beneficiaries named. The testator died during the night of April 20, 1881. The trust fund included certain shares of stock of the P. R. R. Co. On April 14, 1881, a dividend of \$25,000 was declared on this stock, "payable May 2, 1881." On final accounting the executors charged themselves with this sum, treating the dividend as principal. *Held*, no error; that as soon as the dividend was declared the owner of the shares was entitled to it, and it became part of his estate; that the fact it was made payable at a future time was immaterial, that the dividends to which the life tenant was entitled as income were only those declared after the testator's death. *In re Kernochan*. 618

5. On the same principle, *held*, that the widow was entitled to the whole of an extra dividend, declared after such death, although made from net earnings accumulated before that time; that, whenever earned, they were not profits until so declared. *Id.*
6. By the will Mrs. M. was appointed executrix; she duly qualified and acted as such. The will contained a direction that each executor and trustee other than his wife, "do receive and take the full rate of commissions provided by law for each executor," substantially the whole income of the estate was given to her. *Held*, that she was not entitled to commissions as it was the intention of the testator to exclude her from compensation. *Id.*
7. The will of C., after a gift of his residuary estate to his daughter, the defendant, and "to her heirs and assigns forever," contained this provision "I commit my granddaughter (plaintiff) * * * to the charge and guardianship of my daughter. * * * I enjoin upon her to make such provision for said grandchild out of my residuary estate * * * in such manner and at such times and in such amounts as she may judge to be expedient and conducive to the welfare of said grandchild, and her own sense of justice and Christian duty shall dictate." In an action wherein the plaintiff sought to have it adjudicated that a trust was imposed upon the residuary estate for her benefit, and wherein defendant, by her answer, recognized the moral obligation resting upon her and averred her intention of performing it. *Held*, that no such trust was created, nor did defendant take subject to a charge in favor of plaintiff; but that she took an absolute title, and the provision to be made for plaintiff was left wholly to her discretion, as to the amount and manner of the provision and the time when it should be made, the exercise of which discretion could not be interfered with by the court. *Lawrence v. Cooke.* 632

WITNESSES.

1. In an action by assignees for the benefit of creditors, to recover possession of property covered by the assignment, which had been levied upon by defendant as sheriff, by virtue of an attachment against the assignor, the defendant alleged the assignment to be fraudulent and void as to creditors. On the trial defendant called the assignor as a witness, and after he had testified to facts and circumstances, from which an inference of fraud could properly be drawn, he gave an explanation thereof, which, if true, was sufficient in law. Defendant then rested, and the court directed a verdict for plaintiff, on the ground that defendant was bound by the explanatory evidence, for the reason that he could not discredit or impeach his own witness. *Held*, error; that the witness was to be regarded as adverse to the party calling him, and the same credit was not necessarily to be given to the testimony against that party, as to that in his favor; and that it was a proper question for the jury as to what degree of faith should be given under the facts of the case to the explanatory testimony. *Becker v. Koch,* 894
2. *It seems*, the rule prohibiting a party from impeaching his own witness applies only to prevent, *First*. The calling of witnesses to impeach the general character of the witness. *Second*. Proof of prior contradictory statements by him. *Third*. A contradiction of the witness by another when the only effect is to impeach and not to give material evidence upon any issue in the case. *Id.*

— Competency of, under section 829 of Code of Civil Procedure.
See Nearpass v. Gilman. 506

YONKERS (CITY OF).

1. Plaintiff was riding along one of defendant's streets, the road-bed of which was thirty feet wide, macadamized and in good con-

dition. On one side, where the street was graded up about twelve feet, there was a sidewalk ten feet wide, separated from the road-bed by a curbstone eight inches high. There was no fence, wall or other obstruction to guard the outer edge of the sidewalk. The horse attached to the wagon in which plaintiff was riding became frightened and commenced to shy, and, spite of the efforts of the driver, went over the curbstone and sidewalk and down the embankment, carrying the wagon and plaintiff with him. In an action to recover damages, for injuries received by plaintiff, it appeared that the street had been in the same condition since its

opening, over ten years before, and, so far as appeared, no similar accident had occurred. *Held*, that defendant was not liable; that the accident was one of a class so rare, unexpected and unforeseen, defendant could not be charged with negligence for a failure to guard against it. *Hubbell v. City of Yonkers.* 434

2. Also *held*, the principle was not altered by a provision in defendant's charter, giving it power, through its common council, "to compel or cause the making and repairing of railings at exposed places in the streets;" that as regards travel on the street this was not an exposed place. *Id.*

Ex. H. a. a.

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